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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1993

NEW YORK CITY TRANSIT AUTHORITY,

Petitioner,

against

BERNARD McCUMMINGS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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(5091—LC10-149—1993)

QUESTIONS PRESENTED

1. In *Tennessee v. Garner*, 471 U.S. 1 (1985) this Court held that a police officer who shot and killed an unarmed teenager, fleeing after he had been caught burglarizing an empty home, had violated the decedent's Fourth Amendment rights. Shooting the fleeing teenager was a "seizure", the Court held, and an unreasonable one, considering that the teenager was unarmed, and was suspected of committing a mere property offense.

In our case, petitioner's police officer had probable cause to believe that respondent Bernard McCummings, though unarmed, had participated in robbing and strangling a frail, 72-year old subway passenger. When the 23-year old McCunmings started to run away, the officer shot him, solely to prevent his escape. McCummings sued petitioner, and recovered a $4.3 million judgment, which was affirmed by the New York Court of Appeals. The question presented by this case is the following:

Does the Fourth Amendment, as elucidated by *Garner*, condemn as unreasonable a police officer who uses deadly force to capture a fleeing felon, who though unarmed, had committed a felony involving serious physical violence? Or does *Garner* merely condemn as Constitutionally offensive the shooting of a felon who at most had committed a property offense so that, here, petitioner's police officer who shot a felon fleeing from a crime of violence, did not violate the Constitution?

2. Did the New York Court of Appeals deprive petitioner of its property without due process of law when it affirmed the judgment against it on a ground—common law negligence—that was never raised by any of the parties in the proceedings below, whether at trial or appeal, a ground transparently designed to defeat this Court's jurisdiction, and where petitioner would have

asserted different defenses had it known that it stood exposed to liability on a theory of negligence?

Parties

The names of all parties to the proceeding in the court whose judgment is sought to be reviewed here appear in the caption of the case.

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I. *Garner* and *McCummings* leave unresolved the recurring question facing law enforcement personnel in every jurisdiction of the United States: Whether the United States Constitution allows police officers to use deadly force solely to capture a violent, unarmed fleeing felon. Moreover, the answer to that question has divided both the Circuit Courts and the legislatures of the various states . 16

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993.

NEW YORK CITY TRANSIT AUTHORITY,

Petitioner,

against

BERNARD MCCUMMINGS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

Opinions Below

The opinion of the Court of Appeals of New York is officially reported as *Bernard McCummings v. New York City Transit Authority*, 81 N.Y.2d 923 (1993), and appears in Appendix "A" hereto at p.1a. The opinion of the Supreme Court, Appellate Division, First Department is officially reported as *Bernard McCummings v. New York City Transit Authority*, 177 A.D.2d 24 (1st Dept. 1992), and appears in Appendix "B" hereto at p.17a.

Jurisdiction

The order of the New York State Court of Appeals was entered on April 5, 1993 and appears in Appendix "C" at p.59a.

The petitioner by motion served April 30, 1993 and returnable May 17, 1993 moved for rehearing and reargument of the Court of Appeals decision. The Court of Appeals denied the motion on July 8, 1993, a denial not officially reported. The order of denial appears on p.61a of Appendix "D".

In accordance with Rule 13.4 of this Court, this Petition is filed within 90 days of denial by the Court of Appeals of petitioner's application for rehearing.

The Court has jurisdiction to hear Point I of this case under the provisions of 28 U.S.C. 1257(3) because a title, right, privilege or immunity is set up under the Constitution or statutes of the United States, specifically, the reach and limits of the Fourth Amendment's "reasonable seizure" requirement and the Fourteenth Amendment's due process clause. To the extent the judgment rests on the jury's determination that New York Penal Law §35.30 is inconsistent with *Tennessee v. Garner*, 471 U.S. 1 (1985), the Court has jurisdiction because the validity of a state statute was drawn into question because of its being repugnant to the Constitution of the United States.

The Court has jurisdiction to hear Point II under 28 USC 1257(3) because a title, right or privilege is set up under the "due process" clause of the Fourteenth Amendment.

Constitutional and Statutory Provisions Involved

A. Constitutional provisions

The Fourteenth Amendment to the United States Constitution provides in part:

> . . . [No state] shall deprive any person of life, liberty or property, without due process of law.

The Fourth Amendment to the United States Constitution provides in part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . .

B. Statutory provisions

42 U.S.C. §1983 provides in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, . . . any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

New York Penal Law §35.30 provides in part:

> 1. A police officer . . . may use deadly physical force [to capture a fleeing felon] . . . only when he reasonably believes that:
>
> (a) The offense committed by such person was:
>
> (i) a felony or an attempt to commit a felony involving the use or attempted use or threatened imminent use of physical force against a person;

Statement of the Case

A middle-aged transit police officer, Manuel Rodriguez, on plain clothes patrol, hears strangled cries for help coming from a New York subway station. With his partner behind him, he runs down a stairway and encounters a familiar urban scene: two men in their twenties robbing and strangling a frail, old man. The two young men begin to flee, dash down another stairway and open up a formidable lead on the pursuing officers. Officer Rodriguez shouts "Halt, police," to no avail.

To prevent the muggers from escaping, Rodriguez fires five shots; two strike respondent Bernard McCummings, one severing his spine. Another strikes McCummings' accomplice, Jacob Wise in the arm. McCummings, paralyzed, collapses at the bottom of the stairway and is captured. His accomplice, Wise, manages to run out of the station and is caught later in the night at a hospital where he had sought treatment for his wounds.

McCummings, eventually convicted of felonious robbery, sued petitioner New York City Transit Authority pursuant to 42 U.S.C. §1983, charging that the police officer who shot him had used Constitutionally excessive force. Respondent McCummings argued that the Fourth Amendment as elucidated in *Tennessee v. Garner,* 471 U.S. 1 (1985) barred a police officer from using deadly physical force for the sole purpose of capturing a fleeing felon, no matter how violent or heinous the felony from whose commission the criminal was fleeing.

Petitioner countered by disputing respondent's interpretation of *Garner.* According to *Garner's* express language, a police officer could fire. . . .

> . . . if . . . [he or she had] probable cause to believe that [the fleeing felon] had committed a crime involving the infliction or threatened infliction of serious physical

> harm, . . . and if, where feasible, some warning ha[d] been given.
>
> 471 U.S. at 11-12

Thus, under *Garner*, argued petitioner, Officer Rodriguez was justified in firing his gun rather than allow McCummings to escape.

A civil jury in New York, rejecting the Authority's argument, awarded McCummings $4.3 million in damages (App. "E", 62a). The New York Court of Appeals with two judges dissenting affirmed the judgment (1a, 59a) necessarily adopting respondent's extreme understanding of *Garner:* that the Fourth Amendment barred police officers from firing their guns to capture an unarmed fleeing felon—even presumably a suspected mass murderer—and that police officers could never fire their weapons except to defend themselves or others.

The Court of Appeals' majority distorts *Garner's* meaning. It is not unconstitutional for a police officer to shoot a fleeing felon, even an unarmed one, where he or she has reason to believe that the felon had committed a crime of serious violence. A police officer, for example, who spots an unarmed mass murderer who ignores a warning to stop may fire a weapon, contrary to the Court of Appeals' implication, rather than allow the murderer to escape.

The question of what limits if any, *Garner* places on police attempts to capture a fleeing felon should be addresed by this court. Despite its explicit holding, *Garner's* language is elastic enough to support the extreme conclusions the Court of Appeals accepted here.

Moreover, different Circuit Courts have clashed over the meaning of *Garner.* Some appear to have adopted the extreme view endorsed by the *McCummings* court. *See Griffin v. Hilke,* 804 F.2d 1052, 1056 (8th Cir. 1986). Others, the majority, have endorsed the view argued for by petitioner. *See e.g. Ryder v. City of Topeka,* 814 F.2d 1412, 1419 (10th Cir. 1987).

Numerous states which, after *Garner,* had to modify their "justification" statutes have also disagreed about when *Garner* allows a police officer to use deadly physical force to capture a fleeing felon.

The *McCummings* case provides the perfect vehicle for the Supreme Court to clarify *Garner's* reach. It presents in pristine form the factual paradigm which have troubled the Circuit Courts and state legislatures since *Garner:* a police officer stumbles upon an unarmed criminal committing a violent felony, warns the felon to halt, and then fires a gun to prevent his escape.

If the Constitution bars a police officer from shooting an unarmed fleeing felon, even if the felon was suspected of attempted murder, this Court should say so and say so explicitly.

How the federal question was presented

Respondent can be expected to argue that the *McCummings* decision rested on purely state court grounds. The Court of Appeals majority, he will contend, wrote that the case was submitted to the jury on a theory of common law negligence (2a).

The majority's statement is untrue, and grotesquely so. As demonstrated at length (*see* Petition, *Infra*, pp. 10-13), the sole issue before the jury and *on appeal* was whether under *Garner* Officer Rodriguez was justified in using deadly force to prevent McCummings' escape. This court has often noted that it will not be bound by a state court's declaration that it disposed of a suit on an "adequate" state grounds where the record demonstrates otherwise. The record in this case is conclusive.

There are other important grounds for granting the writ. By affirming a judgment based upon a theory of liability never before the trier of facts or any appellate court, i.e., "common law negligence", the Court of Appeals deprived the Authority of its property without due process of law. Had the Authority been put on notice that it could be held liable in negligence, it would have raised the standard New York defenses, such as comparative negligence and assumption of risk, which would have reduced or barred any recovery for respondent.

As demonstrated below, the manner in which the Court below decided *McCummings* is not an isolated case. Rather, it is a direct outgrowth of the New York Court's aggressive exercise of "new federalism" under which the New York Court disposes of constitutional questions by relying on nominally independent and adequate state-law grounds. So determined has the Court of Appeals become to have the last word on constitutional law that at least

once before it relied on state grounds in a transparent effort to defeat this Court's jurisdiction, even though none of the parties had raised state grounds on appeal (*See Patchogue-Medford v. Board of Education*, 70 N.Y.2d 57, 71 [1987]).

Thus, the manner in which the *McCummings* majority decided this suit raises important due process concerns, but it also raises much more. A state court has disposed of a lawsuit raising important Constitutional issues by relying on transparently untenable state-law grounds solely to deprive this Court of the power to review its decision. The additional question the *McCummings* case raises is whether this Court will surrender its role as the supreme Constitutional decision-maker to a state court bent on usurping it, even at the expense of petitioner's due process rights.

Statement of Facts

Sandusky, the victim, enters the 96th Street station

On June 28, 1984 at 8:00 P.M. (317)[1], Jerome A. Sandusky, then 72-years of age (317), entered the New York City Transit Authority's 96th Street subway station on his way to a dinner engagement (317-19, 1995). After paying his fare, he went down the first of two stairways that would take him to the downtown trains (318). First he had to walk down stairway PL-5 until he reached a small landing (318). From there Sandusky would turn right and walk down another stairway, PL-6, which would take him to the downtown platform (318).

As Sandusky walked down PL-5, he noticed someone lounging at the top of the stairway, but made nothing of it (318, 1995). He soon reached the bottom of PL-5, entered the landing, and began to turn, on his way to go down PL-6 (318). As he was turning, Sandusky noticed two men waiting on the landing. The two, Sandusky suspected, were up to no good (318, 1995), an assumption that was quickly borne out by their actions.

McCummings and his accomplices

The two men waiting for him on the landing were Bernard McCummings and Jacob Wise. As Wise later confessed (2040), he, and McCummings and a girlfriend met earlier in the day when

[1]Page references in this section, unless otherwise indicated, are to the Appendix submitted to the New York Court of Appeals.

McCummings, short of cash, suggested that they find, mug and rob a "vic" (896-97; 2039, 2040). Wise and McCummings eventually entered the 96th Street station with one Nathan Woods, who agreed to serve as a lookout (896-97). McCummings and Wise stationed themselves at the PL-5/PL-6 landing, waiting for a victim (2039-40). The elderly Mr. Sandusky soon appeared.

Wise and McCummings promptly went for him, carrying out an agreed upon division of labor. Wise began pummelling and choking Sandusky while McCummings pinned him to the ground and went through his pockets (897). Sandusky, terrified and fearing for his life (*see* 320-21, *cf.* 436, 1517, 1519), screamed for help. Wise responded by choking Sandusky even harder and threatening to kill him (319, 1995, 2040).

The police officers

Wise and McCummings might very well have killed Sandusky (*see* 436) had not two Transit Authority police officers arrived at the scene. Officers Christine Mead and Manuel Rodriguez had been patrolling the 96th Street station, the scene of many earlier muggings (1516), on plain-clothes undercover duty (1513). Sometime before they heard Sandusky's screams, the two officers noticed McCummings and company loitering suspiciously on the uptown station platform (136, 1516). The officers decided to avoid calling attention to themselves by walking upstairs to the station's entrance (1516). Suddenly they heard screams (138-39).

The officers, their weapons drawn, ran into the station, with Rodriguez leading (138, 139). As they reached the top of stairway PL-5, they saw Woods, the lookout, standing silently on the stairway (139, 1517). Mead, still following Rodriguez, continued running down PL-5. Before she reached the landing she saw McCummings and Wise strangling and beating the elderly Sandusky (147, 1517). Rodriguez shouted "Police don't move!" (149, 323, 1518). Mead then heard several shots being fired in rapid succession but did not actually see Rodriguez firing his weapon.

After reaching the landing, Mead turned the corner, and saw McCummings, 20 feet away, face down on the bottom of stairway PL-6 (168). The other robber, Wise, was sprinting away on the downtown platform (166). Mead ran after him, but Wise eluded

her (168, 2000). Wounded in the arm (2040) by one of Rodriguez' bullets, Wise was eventually captured at a local hospital (2040).

Rodriguez' account

The two people with the most direct knowledge of the shooting, Rodriguez and McCummings, gave widely divergent accounts of what happened. Rodriguez testified he ran into the station and down PL-5, after he heard Sandusky's screams (1517). As he ran down PL-5, his weapon drawn (1517), Rodriguez saw McCummings and Wise choking and robbing Sandusky on the PL-5/PL-6 landing (1517). Rodriguez reached the landing and shouted "Police, don't move!" (1518), but Wise and McCummings ignored his warning; they lunged at him. To defend himself Rodriguez fired five shots (1575), two of which hit McCummings (1997) and one Wise (2037). The 39 year old Rodriguez (1985) then pursued the 23 year old McCummings (888) who ran down PL-6 until he collapsed on the downtown platform (1524).

Respondent's version

McCummings' account of the shooting differed considerably. He admitted that he was robbing and beating Sandusky (896-97, *cf.* 25-26; *see* App. F, 69a), but denied ever lunging at Rodriguez. To the contrary, before Rodriguez reached the landing, Woods, the lookout, yelled out "Yo" (897), a signal for McCummings and Wise to flee. McCummings immediately dashed down PL-6 and had just reached the downtown platform when two shots, fired by Rodriguez from the top of the landing, 17-20 feet away (36, 86, 1076, 1660), struck him in the back. One of the bullets transected McCummings' spine, and he collapsed immediately. (*See generally* 762-64).

* * *

The two sides may have disagreed about many of the details of the shooting, but a solid core of fact remained unshakeable. First, it was indisputable that Sandusky screamed for help and that Rodriguez heard those screams. Sandusky testified he screamed (319). McCummings' accomplice admitted that Sandusky screamed (2040), and Meade, Rodriguez' partner, also testified that Sandusky screamed (138, 234). Rodriguez himself swore that

he heard screams, which sounded as if someone were dying (1517, 1519).

Secondly, it was established that Rodriguez saw in Sandusky a badly beaten, old man, the victim of a violent felony. Rodriguez testified that he actually saw Sandusky being strangled (1521) and other police officers who arrived at the scene sometime later described a bleeding, badly beaten and barely conscious Sandusky (382, 424, 436). Sandusky, in fact, had to be hospitalized for his beating (382). Combined with the presence of a lookout and two fleeing suspects, these facts gave Officer Rodriguez ample cause to believe that McCummings had committed a violent felony, and was seeking to elude capture.

Nor is there any doubt that Rodriguez shouted a warning. Rodriguez (1518), Meade (149) and Sandusky (323) all testified to the warning, and McCummings never denied that Rodriguez warned him to stop. Finally given the fact that the 39 year old Rodriguez was being outpaced by the 23 year old McCummings who had opened up a 20 foot lead, Rodriguez had no choice but to shoot or allow McCummings to escape.

In short, argued the Authority, if *Garner* allowed an officer with probable cause to believe that the fleeing felon had ". . . committed a crime involving the infliction or threatened infliction of serious harm, [to fire a weapon] . . . if some warning has been given . . ." at p. 11, then Rodriguez was legally justified to shoot McCummings and Wise, *even* under McCummings' version of events.

Legal contentions

Respondent disagreed with the Authority's understanding of *Garner*, arguing that under *Garner* the police could never use a weapon solely to capture a fleeing felon, no matter how violent the felony committed, unless the felon threatened the officer's or another's safety (Appendix G, p. 74a, Appendix H, p. 76a). True, New York's Penal Law §35.30, the "justification" statute expressly authorized an officer to use a weapon to capture a violent fleeing felon. But to the extent that the Penal Law clashed with respondent's understanding of *Garner*, it was the Penal Law which would fall as constitutionally offensive (*see* 75a-76a

The parties' contentions—why a federal question is at stake in this suit and why this Court has jurisdiction to hear this case

The parties' respective legal contentions deserve added emphasis for a critical reason. The Court of Appeals' majority stated that the suit was submitted to the jury on a theory of "common law negligence" (2a) which, if true, would deprive this Court of jurisdiction to hear this case. The majority's statement is flatly, grotesquely, perversely untrue.

From the trial's beginning, respondent and petitioner may have argued about many things, but both agreed that liability was to be governed solely by *Tennessee v. Garner*, 471 U.S. 1 (1985). As respondent remarked in his trial memorandum: "The controlling case in situations involving the use of deadly force to apprehend unarmed fleeing felons is *Tennessee v. Garner*, 471 U.S. 1 (1985)" (Appendix F, p.69a).

As the trial continued (Appendix H p.75a-76a) the parties argued about what *Garner* meant, but again both sides agreed that *Garner* alone controlled (*see* 81a). Thus, respondent's "request to charge" (*see* Appendix G p.72a-74a) cited *Garner* as controlling and quoted directly from that case. Request "4", a typical example (73a), quotes *Tennessee v. Garner*, 471 U.S. at 11-12 verbatim, except that it substitutes "the New York statute" for the Tennessee statute, and cites two additional cases which applied *Garner*.

The trial court, acceding to the request of both parties (75a), said often that it would charge *Garner* to the jury (*see* 78a-79a), a promise it kept. The charge (*see* Appendix J p.82a-86a) focuses solely on *Garner* and Penal Law §35.30 which the trial court understood, correctly, mirrored the *Garner* standard (80a). *See Heath v. Henning*, 854 F.2d 6 [2nd Cir. 1988].

The jury itself thought that it was supposed to apply *Garner*. During deliberations, it sent a note to the trial judge seeking guidance on "Law on use of deadly force, Penal Code §35.30 of the Supreme Court" (87a).

Additionally, all five justices at the Appellate Division agreed the case was decided under *Garner*. *See McCummings v. NYCTA*, 177 A.D.2d 24 (1st Dept. 1992). Typical are the remarks of

Justice Milonas, the majority opinion's author. He rejected a challenge the Authority mounted to the retroactive application of the 1986 *Garner* decision to the 1984 McCummings shooting by noting:

> Yet, since defense counsel not only did not object to reliance upon *Tennessee v. Garner, supra,* but acknowledged that *Garner* is both controlling and retroactively applicable, defendant may not for the first time before this court endeavor to disclaim the relevance and applicability of *Garner* . . .
>
> Appendix "B" p.20a

The Appellate Division dissenter Justice Rubin also agreed that the case's outcome rested on the meaning of *Garner.* After noting that the trial court had dismissed respondent's claim that the Authority was negligent in training Officer Rodriguez, Judge Rubin noted: ". . . the remainder of the action is founded upon the United States Supreme Court's decision in *Tennessee v. Garner.* . ." (35a). Moreover, he went on, ". . . there is a general agreement between the parties to the case that *Garner* is dispositive. . . " (36a).

In light of the Court of Appeals decision that the case was submitted to the jury on "common law negligence", it is worth noting the trial judge's opinion on that issue:

> I am not charging negligence in this case. I am charging basically whether or not the use of deadly force, deadly physical force was justified or unjustified and the plaintiff has the burden of proof of establishing the lack of justification.
>
> (Appendix I, p.81a)

These remarks were echoed by Justice Rubin, at the Appellate Division.

> The gravamen of plaintiff's action, however it may be expressed in his complaint, is the intentional tort of assault and battery. There is no doubt that a battery was committed. Officer Rodriguez admittedly fired two bullets into the back of Bernard McCummings, as the IAS

> Court repeatedly reminded the jurors during the course of delivering its instructions.
>
> (Appendix B, p.47a)[2]

In short, given the unanimity at trial, as well as on appeal, where respondent argued that *Garner* controlled, only one conclusion is possible. *Garner's* meaning was the only issue in this case, "[a fact which] . . . plaintiff conceded by his own evidence in the civil case . . ." (*McCummings v. NYCTA*; Appendix A, p.14a, Bellacosa, dissenting).

Under its own principles of appellate review, the Court of Appeals could not have affirmed a judgment on common law negligence, even had respondent requested it to do so on appeal. This is so because for more than 100 years the Court of Appeals has insisted that ". . . a judgment must stand upon the case as it went to *the jury* . . ." *Wasson v. Pettit*, 117 N.Y. 118, 121 (1889); *Shapiro v. City of New York*, 32 N.Y.2d 96, 101, fn.5 (1973); *Lichtman v. Grossbard*, 73 N.Y.2d 792, 794 (1988); *New York Metro Corp. v. Chase Manhattan Bank*, 52 N.Y.2d 732 (1980); *McMillan v. State of New York*, 72 N.Y.2d 871 (1988). *See also Lefkowitz v. Lebensfeld*, 51 N.Y.2d 442, 447-48 (1980). See also *Gordon v. American Museum of Natural History*, 67 N.Y. 836, 837 footnote (1986). Indeed so strongly has the Court maintained that parties would be bound by the theory submitted to the jury that it has affirmed judgments even when the jury decided a case on an untenable theory of law. (*See e.g. Brown v. Du Frey*, 1 N.Y.2d 190, 194 [1956], Court affirms judgment awarding damages for libel contained in will.)

Here of course, it was not respondent, but the Court of Appeals itself which injected "common law negligence" into this suit. In doing so, the Court, again violated its own precedent. An Appellate court, the Court noted, could not grant relief on "a new theory of recovery first introduced by the Appellate Court against a party who

[2]True, respondent's complaint pleaded a cause in negligence. Early in the suit respondent had contended that he had nothing to do with mugging Sandusky, and that he was struck by stray police bullet, fired by a negligent Rodriguez. At trial, respondent, who was imprisoned on his *own plea of guilty*, admitted that he robbed Sandusky, but argued that Rodriguez nevertheless violated his rights by shooting him (*see* p.69a).

had no notice or opportunity to defend against that theory." *Collucci v. Collucci*, 58 N.Y.2d 834, 837 (1983). As an intermediate New York Appellate Court, following *Collucci's* lead, phrased it, ". . . by any standard it would be unusual behavior for an appellate court to reach and determine an issue never presented in litigation and to do so without providing an opportunity for the adversely affected parties to be heard on a question which they had no reason to believe was part of the litigation. . ." *Grant v. Cuomo*, 130 A.D.2d 154, 175 (1st Dept. 1987), aff'd 73 N.Y.2d 820 (1988).

* * *

As this Court noted only recently, the question of whether a particular state court judgment rests on an "adequate" state ground is itself a federal question which this Court reviews *de novo*. (See *Howlett v. Rose*, 496 U.S. 356 (1990); See also *Michigan v. Long*, 463 U.S. 1032, 1038 (1983); *Staub v. City of Baxley*, 355 U.S. 313, 318-319 (1958). "To hold otherwise would open an easy method of avoiding the jurisdiction of this Court." *Terre Haute & Indianapolis R. Co. v. Indiana*, 194 U.S. 579, 589 (1904).

Thus, this Court has rejected conclusions of state courts purporting to rest on "adequate" state grounds where the state ground proved to be ill-founded or a sham (*see e.g. Postal Telegraph Cable Company v. City of Newport*, 247 U.S. 464 [1918]), or where the stated ground has "no fair support in the record" (see *Ancient Egyptian Order v. Michaux*, 279 U.S. 737, 744 [1929]; cf. also *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 234 [1969]).

The record in this case is so one-sided, that one reading it can only gape at the Court of Appeals' characterization of this suit as a "common law negligence" action. Hence, if this Court looks beyond the state court's words to the reality which belies them, it should grant certiorari to review the federal question necessarily passed upon by the Court of Appeals.[3]

[3]The fact that the jury was also told to consider Penal Law §35.30 does not change matters since P.L. 35.30 largely tracks *Garner* and is certainly no stricter. (*See Heath v. Henning*, 854 F.2d 6, 9 [2nd Cir. 1988]). Indeed *this* Court cited to Penal Law §35.30 as falling within a class of statutes which passed constitutional muster under *Garner*. (*See Garner* at p.17, fn.18; *see also Crawford v. Edmonson*, 764 F.2d 479, 482, fn.2 (7th Cir. 1985).

Proceedings below

The jury verdict and the subsequent appeals

A New York County jury found that Rodriguez was not justified in firing his weapon and awarded McCummings approximately $4,300,000 in damages. The Authority appealed the decision to the Appellate Division, First Department, which in a 4-1 vote affirmed the judgment. *(See McCummings v. New York City Transit Authority,* 177 A.D.2d 24 [1st Dept. 1992]; Appendix "B").

The Court of Appeals decision

The Appellate Division granted the Authority leave to appeal to New York's highest court, the Court of Appeals. On April 5, 1993, the Court of Appeals, with two judges dissenting, affirmed the judgment in respondent's favor (Appendix "A", pp.1a-16a). The majority concluded the lawsuit was submitted to the jury on a theory of "common law negligence" (2a). Based on the evidence before it, the jury could decide that even if Rodriguez complied with *Garner,* he still acted unreasonably in using a weapon to capture McCummings.

The Court of Appeals majority also took a narrow view of *Garner's* holding. According to the majority, *Garner* spoke only to the circumstances under which an injured fleeing felon could successfully assert that he had been deprived of his constitutional rights. It had nothing to say, thought the majority, about when a police officer's use of deadly force *would* pass constitutional muster (*see* 3a-4a). As for *Garner's* quote at 471 U.S. 11-12 in which this Court explicitly outlined when a police officer *could* use a weapon without offending the Constitution, the majority apparently sloughed it off as *dicta.*

Finally, continued the majority, even if *Garner* did control, the jury could still second-guess the police officer's decision to shoot and thus find against the Authority.

Two judges dissented. Judge Vito J. Titone concluded the Authority was entitled to judgment as a matter of law.

> Responding promptly to the 72-year old victim's cry for help, the police in this case came upon what was clearly a mugging. What the officers saw and heard when they arrived at the scene left no room for doubt that a crime of

violence involving at least two attackers and a "lookout" had just occurred . . . Given the immediacy of the occurrence, the clear risk of an escape into the labyrinthine subway system and the obvious need to act quickly and without reflection, I would conclude, without reservation, that the arresting officer acted reasonably, as a matter of law when he fired his gun at the fleeing suspect in an effort to prevent him from eluding arrest and remaining free to commit other violent crimes against other innocent victims.

Appendix "A" (7a-8a)

Judge Joseph W. Bellacosa agreed.

In *Tennessee v. Garner* (471 U.S. 1, *supra*) and *Graham v. Connor* (490 U.S. 386, *supra*), the United States Supreme Court set standards for the use of force to apprehend a suspect in a nonpersonal, property-type crime. *Garner* added, however, that "if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the inflictions or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape" (*supra*, 471 U.S. at 11). That is precisely this case. . .—a crime of force in actual progress against a person in a place of public transportation—the use of deadly force can be found to be reasonable and justifiable as a matter of law in a civil suit context.

(13a)

REASONS FOR GRANTING THE WRIT

I

Garner and _McCummings_ leave unresolved the recurring question facing law enforcement personnel in every jurisdiction of the United States: Whether the United States Constitution allows police officers to use deadly force solely to capture a violent, unarmed fleeing felon. Moreover, the answer to that question has divided both the Circuit Courts and the legislatures of the various states.

A. _Garner_ creates confusion about what is or is not permissible police conduct

May a police officer shoot an unarmed felon escaping from the scene of a *violent* crime? Or does the Constitution allow the officer to use a gun only to defend himself or others so that the felon must be allowed to escape? The answer to that question turns on an understanding of this Court's decision in *Tennessee v. Garner,* 471 U.S. 1 (1985).

The *Garner* Court found that the use of deadly force to capture a teenaged felon, fleeing after burglarizing an empty house was an unreasonable "seizure" as a matter of law.

> The use of deadly force to prevent the escape of all suspects, whatever the circumstances is not constitutionally reasonable . . . Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so.
>
> *Garner* at p. 11.

The *Garner* court then went on to outline the circumstances under which a police officer *could* use deadly force to capture a fleeing felon.

> Thus, if a suspect threatens the officer with a weapon, or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of

> serious physical harm, deadly physical force may be used if necessary to prevent the escape, and if, where feasible, some warning has been given.
>
> *Id.* at p. 11-12

Garner's holding would seem to leave little doubt that a police officer could use deadly physical force to capture a felon who had committed a violent crime. Nevertheless, *Garner* contains both *language* and *reasoning* that could be used to advance the extreme position of the *McCummings* court:

> We conclude [said the *Garner* court] that [deadly] force may not be used unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.
>
> At p. 1

A surface reading of this paragraph suggests that an officer could never fire a gun to capture even the most sadistic fleeing felon, if the felon was simply trying to escape and had no interest in engaging the officer in a shootout.

Then, too, some of *Garner's reasoning* lends itself to the extreme conclusion endorsed by *McCummings*. *Garner* rejected Tennessee's argument that the common-law rule which allowed police officers to shoot *all* fleeing felons assured that a higher percentage of criminal suspects would be brought to the bar of justice.

> The use of deadly force is a self-defeating way of apprehending a suspect and so setting the criminal justice mechanism in motion. If successful, it guarantees that that mechanism will not be set in motion.
>
> *Garner* at p. 10

Taken to its logical conclusion, this reasoning bars the police from using a gun to capture any suspect, violent or not. By shooting the suspect dead, the police officer brings "the criminal justice mechanism" to a halt, whether the suspect is a non-violent felon like Garner, or a violent one like McCummings.

The *Garner* court also noted that the common-law rule allowing a police officer to shoot any felon had to be understood in its historical context. The rule arose at a time when all felons were

routinely executed. (*Garner* at p. 13-14). Hence, the means used to capture the fleeing Garner were disproportionately severe to the punishment he ultimately faced if captured, since burglary is no longer a capital offense.

But few violent felonies, even rape, robbery, manslaughter, assault, are punishable by death. *Garner's* reasoning would mean that unless a police officer had reason to believe that a fleeing felon had committed a capital felony, the officer could not use a weapon to capture him.

In short, there is an unresolved tension between *Garner's* rationale which argues against a police officer ever shooting at a fleeing felon, except in self-defense, and *Garner's* explicit holding that a police officer may shoot a felon fleeing from a violent crime. The uncertainty created by *Garner* can only be dispelled by the court which created it: the United States Supreme Court.

B. Certiorari should be granted because the Circuit Courts have reached different conclusions about what *Garner* means.

Garner's ambiguities have predictably resulted in a split among the Circuit Courts about what police conduct is permissible.

Most federal Courts have adopted the Authority's understanding of *Garner:* A police officer with reason to believe a felon is fleeing from a violent felony can use deadly force without offending the Fourth Amendment. *See e.g. Krueger v. Fuhr,* 991 F.2d 439 (8th Cir. 1993); *Smith v. Freland,* 954 F.2d 343 (6th Cir. 1992); *Ryder v. City of Topeka,* 814 F.2d 1412, 1419 (10th Cir. 1987). *See also Henry v. Perry,* 866 F.2d 657 (3rd Cir. 1989); *Ford v. Childers,* 855 F.2d 1271 (7th Cir. 1988, en banc); *Ramos-Ayala v. Diaz-Martinez,* 707 F.Supp. 75, (D.P.R. 1988).

Not all Circuits have agreed. In *Griffin v. Hilke,* 804 F.2d 1052 (8th Cir. 1986) the Circuit Court concluded that it was improper to grant summary judgment in a suit with strong *Garner* implications. Police Officer Hilke received a radio report that an armed fugitive, Griffin, suspected of armed robbery, was heading his way. Hilke soon spotted Griffin, fleeing with a coat draped over his arm, apparently hiding a gun. Hilke gave chase but when

Griffin opened up a 40 foot lead and was about to escape he fired his gun, wounding Griffin in the leg.

The Eighth Circuit citing to *Garner*, refused to dismiss the suit against Officer Hilke, even though it accepted the officer's assertion that he believed the fleeing Griffin was armed. *Griffin* at p. 1055. *Garner*, the Eighth Circuit held, allowed a police officer to use deadly force ". . . [only if]the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others . . ." *Id.* at p. 1056. Since the fleeing Griffin, though armed, had no intention of engaging the officer in a shootout—to the contrary, he was simply trying to get away—Officer Hilke had no right to fire a gun solely to capture him.

In addition to the direct conflict *Hilke* presents, one other Circuit case employs reasoning inconsistent with *Garner* and its progeny. In *Hopkins v. Andaya*, 958 F.2d 881 (9th Cir. 1992) the Court, reversing summary judgment granted in favor of defendant police officer, noted that the officer pursued by a wounded felon should have tried to hide first, rather than fire his weapon. (*Hopkins* at 886-87). It is true that the officer might have saved himself had he followed the Court's advice to run away and hide. By doing so, however, he would have increased the chance that the felon would escape. The *Hopkins* Court appeared to assume that a police officer could never fire a weapon solely for the purpose of effecting a capture, an assumption at odds with the views of the other Circuit Courts.

The Circuit Courts have also disagreed about another element of *Garner*, the *nature* of the *warning* a police officer must give before he shoots. *Garner* required "some warning", "if feasible" (*see Garner* at pp. 11-12) which the Court in *Ford v. Childers*, 855 F.2d 1271, 1276 (7th Cir. 1988) held was satisfied by the shout of "halt, police". *See also Krueger, supra.* Other Courts require more, understanding *Garner* to hold that the officer must explicitly warn of his intention to use deadly force; a simple "stop, police" is not enough. *See Acoff v. Abston*, 762 F.2d 1543,

1547 (11th Cir. 1985); *Pruitt v. City of Montgomery,* 771 F.2d 1475, 1482 (11th Cir. 1985). Both positions draw plausible support from *Garner's* ambiguous declaration that "some" warning be given. The Court should resolve an ambiguity it itself has created.

C. The legislatures of the various states have also disagreed about when *Garner* allows police officers to use deadly force.

That *Garner* itself left a great deal of uncertainty is also evident in the way many states responded to the decision. In *Garner* the court found that 19 states had justification statutes resembling the Tennessee statute which the Court condemned as constitutionally suspect.

As a result of *Garner,* many of these states rewrote their justification statutes, but the way in which they did varied widely. Some of them adopted statutes similar to New York's Penal Law §35.30, which allows a police officer to fire a weapon to capture a violent felon. (*See e.g.* Florida. Stat. Ann. §776.05(3), Illinois Stat. Ch. 720 §5/7-5(2), Washington Crim. Code §9A.16.040(2)(3). *See also* Tennessee Code Ann. §7-108.

Other states interpreted *Garner* to limit a police officer's use of deadly physical force more severely. Arizona, for example (*see* Arizona Rev. Stat. §13-410c[2] [a-c]), allows a police officer to use deadly physical force only when pursuing one who has committed a felony involving the use of a weapon, or if the officer knows that the fleeing felon "is likely to endanger human life or inflict serious bodily injury to another unless apprehended without delay." This last provision presumably means that a police officer pursuing a husband suspected of killing his wife would not have the right to fire a gun. The officer would have no reason for concluding that the suspect would likely kill in the *future*. This requirement goes well beyond the *Garner* standard.

The states have also differed about the nature of the *warning* the officer had to give before he could fire a weapon. Washington, Illinois, Utah and Florida, in the earlier cited statutes merely parrot *Garner* that "some" warning be given.

Connecticut (*see* Conn. Penal Code §53a-22[c]) and Tennessee (Tenn. Code of Crim. Proc. §40-7-108[b]), have added the pro-

viso the police officer must first warn the fleeing felon that he intends to use deadly physical force. A simple "halt police" is not enough.

The *Garner* decision thus leaves numerous doubts about when law enforcement personnel may use deadly physical force, doubts reinforced by the *McCummings* decision.

D. The *McCummings* decision presents a particularly appropriate vehicle to settle the issues left undecided by *Garner*.

The *McCummings* case presents in pristine form the key question *Garner* left unanswered: whether a police officer may shoot an unarmed felon, fleeing the scene of a violent crime.

The undisputed facts demonstrate that Officer Rodriguez heard blood-curdling screams coming from inside the subway station, a fact which even respondent conceded (*see* Appendix A, p. 7a-8a). Decending the stairway, he saw a brutally beaten man in his seventies, the victim of a vicious mugging and robbery. The old man's attackers, McCummings and Wise, started running away, opening up a nearly 20 foot lead. Rodriguez shouted a warning, but the two continued to run.

As Judge Titone, a McCummings dissenter, concluded, given the immediacy of the occurrence, the clear risk that the two would escape into the labyrinthine subway system and the obvious need to act quickly and without reflection, Rodriguez really only had one choice: shoot or let McCummings escape.

If a police officer, like petitioner's, can be condemned for capturing the two, instead of folding his arms and letting them escape, then the *McCummings* court must be applauded for reaching the right result.

E. The *McCummings* case was incorrectly decided.

In fact, however, the *McCummings* decision is simply wrong. In explicit language, this Court in *Garner* allowed a police officer to do what *McCummings* said he could not (*Garner* at pp. 11-12). Moreover, the *Garner* court, reviewing various state justification statutes, cited with approval New York Penal Law §35.30, which explicitly allows a police officer to shoot a violent fleeing felon (*see Tennesee v. Garner*, at p. 17, ft. 18; *see also*

Crawford v. Edmonson, supra at p. 482, fn. 2). The Authority's understanding of *Garner* is also borne out by the decisions of a majority of post-*Garner* Circuit courts cited before, as well as by the actions of most state legislatures (*see* Petition, *Id.*, at p. 18-21).

Not only *Garner's* explicit holding, but its rationale supports the Authority's interpretation while undermining the Court of Appeals'. *Garner* condemned Tennessee's fleeing felon rule because it believed ". . . numerous misdemeanors involve conduct more dangerous than many felonies." (*See Garner* at p. 14) The statement is true as an abstract proposition, but few crimes are more heinous and dangerous than robbing and strangling a 72-year old man, who but for the intervention of the officers might well have suffocated or died of a coronary.

The *Garner* court also felt that since few burglars are violent, the fleeing teenager in *Garner* was not dangerous enough to be shot (*see Garner* at p. 21). A different situation obtains here. Someone who strangles and beats a frail old man is inherently dangerous. Allowing McCummings to escape would have increased the likehood that he would strike again, targeting the weakest members of society as his prey. (*See especially Ryder v. City of Topeka*, 814 F.2d 1412, 1419 [10th Cir. 1987].)

Nor were there unresolved issues of fact lurking in the record which the jury could have decided against petitioner.

The majority's decision to wring the record dry in order to second-guess the petitioner's police officer runs afoul of *Graham v. Connor*, 490 U.S. 386 (1989). There, the court warned the "police conduct in a deadly force situation must be assessed from the perpective of a reasonable officer on the scene, rather with the 20/20 vision of hindsight." 490 U.S. at 396. By concluding that there were alternatives available to a police officer faced with making a split-second decision of whether to allow McCummings to escape, or to capture him by the only means available, the Court of Appeals was engaging in such second-guessing.

Thus although the Court of Appeals purported to decide this case by looking to the facts, what it did in substance was to

decide the suit on a mistaken view of the law (see *Washington ex rel Oregon R. & Nav. Co. v. Fairchild*, 224 U.S. 510, 526 [1911]), leaving the way open for review by this Court. (*See also Oyama v. California*, 332 U.S. 633 [1948]; *N.Y. Times v. Sullivan*, 376 U.S. 254 [1964]). *In Re Primus*, 436 U.S. 412, 433 (1978).

II

The New York Court of Appeals deprived petitioner of due process by affirming the judgment on a theory which was never presented to the jury or any Appellate Court and which the Authority never had a chance to defend.

Suppose the Court of Appeals had found the Authority liable because Officer Rodriguez had blue eyes and blue-eyed officers are notoriously trigger-happy. No one under those circumstances would deny that the Court of Appeals deprived the Authority of its property without "due process" of law. Neither at trial nor appeal had anyone argued that eye color had any bearing on liability. By introducing a new theory of liability the Court of Appeals would have robbed the Authority of the chance to show that the Court's legal and factual premises were untenable, and that officers with blue eyes were just as competent as officers with eyes of any other shade. Indeed, the Court's decision would have stripped the Authority of the chance to show that Rodriguez was not blue-eyed but brown-eyed instead. What our hypothetical court did in the illustration above is what the Court of Appeals actually did in the *McCummings* case.

As noted, both at trial and on appeal, all sides agreed that *Garner* was solely determinative of liability. The Authority could not have imagined the Court of Appeals would rule against it based on a theory of common law negligence because (1) the Court of Appeals professes not to affirm judgments based on theories which the jury has not considered (*see* Petition, *supra*, p.12); and (2) because the Court of Appeals, under settled precedent could not on its own introduce a new theory to rule against the Authority (*see Collucci v. Collucci*, 58 N.Y.2d 834, 837 [1983]).

Even beyond this, the Authority's surprise at discovering it had lost a simple negligence action is even more understandable for another reason. Contrary to the Court of Appeals, New York does not recognize the tort of "negligent battery", an egregious oxymoron, and the two cases the Court of Appeals cited (*Flamer v. City of Yonkers*, 309 N.Y. 114 [1955], and *Herndon v. City of Ithaca*, 43 A.D.2d 634 [3rd Dept. 1973]) do not prove that it does.

The court in *Flamer* found defendant liable for a "negligent battery" for the simple reason that plaintiff and defendant *agreed* to have the case submitted to the jury on that theory (*see Resp. Brief, Ct. of App. cases*, vol.9518, case 6, available at Supreme Court, Kings County Law Library). The parties were thus bound by the course they charted. *Herndon* arose out of a pure "accident" in which a police officer's gun accidentally discharged during a struggle, striking plaintiff.

By contrast, other New York cases establish that it makes as much sense to speak of a "negligent battery" as it does to speak of shooting someone "accidentally on purpose". *See e.g. Panzella v. Burns*, 169 A.D. 2d 824, 825 (2nd Dept. 1991); *Rafferty v. Arnot Ogden Memorial Hospital*, 140 A.D.2d 911 (3rd Dept. 1988); *Trott v. Merit Department Stores*, 106 A.D.2d 158 (1st Dept. 1985); *cf. Murray v. Long Island Railroad Company*, 35 A.D.2d 579 (2nd Dept. 1970), aff'd 28 N.Y.2d 849 (1971). Moreover, New York's Pattern Jury Instructions, the authoritative statement of New York law, explicitly notes that once a defendant intentionally subjects a plaintiff to non-consensual physical force, "negligence" concerns fall by the wayside; battery becomes the operative tort. (*See N.Y. Pattern Jury Instructions*, Civil, Vol. 2, §3:3, p. 10-11 [Dec. 1992 Supp.]).

Indeed, had the Authority known that this battery and §1983 suit was to be reviewed as a negligence action, it would have tried it differently. It would have focused on McCummings' comparative negligence, thereby reducing its exposure to damages. (*See* New York CPLR §1411). Then, too, instead of trying to prove that Rodriguez' conduct conformed with *Garner*, the Authority could have far more easily demonstrated that Rodriguez's conduct was that of a "reasonable officer", or at the least, that respondent failed to prove that it was not.

The Authority could also have relied on other substantive New York negligence defenses to defeat respondent's claim (*see Barker v. Kallash*, 63 N.Y.2d 19 [1984]; *Abergast v. Board of Education*, 65 N.Y.2d 161 [1985]). Under those decisions, a plaintiff, like McCummings, injured while committing a serious crime, as well as during an act implying assumption of risk, would have been precluded from tort recovery.

In short, the Authority was found liable on a theory it never had a chance to contest, whether at trial or on appeal, a legally untenable theory concocted by the New York Court of Appeals in order to impose a multi-million dollar liability on petitioner, and to defeat this Court's power to hear this suit.

This Court has not hesitated to condemn similar state-appellate court-misconduct which deprived litigants of the process due them under the law. Thus, in *Cole v. Arkansas*, 333 U.S. 196 (1948), petitioners were criminally charged and tried for violating §2 of an Arkansas statute, which was challenged as constitutionally suspect. The Arkansas Supreme Court tried to evade this Federal issue by affirming *as if* petitioners had been tried not for a violation of the constitutionally suspect §2, but the more benign (and entirely distinct) §1 In condemning the state court's action, this Court stated:

> Without completely ignoring the judge's charge, the jury could not have convicted petitioners for having committed the separate, distinct and substantially different offense defined in §1. Yet State Supreme Court refused to consider the validity of the conviction under §2 for violation of which petitioners were tried and convicted. It affirmed their convictions as though they had been tried for violating §1, an offense for which they were neither tried nor convicted.
>
> 333 U.S. at 200, 201 (footnote omitted)

Building on *Cole's* reasoning, this Court in *Spevack v. Klein*, 385 U.S. 511 (1966) found that the New York Court of Appeals which affirmed petitioner's disbarrment on a theory never raised in any proceeding below, deprived petitioner of due process by preventing him from challenging the newly raised theory.

In an array of other cases, this Court, in criminal, quasi-criminal and civil contexts, has condemned decisions by state courts or regulatory bodies which have deprived litigants of their liberty or property without first notifying the litigants of the precise charges or claims against them. *See e.g. Ohio Bell v. Public Utilities*, 301 U.S. 292 (1937); *S.E.C. v. Chenery Corp.*, 318 U.S. 80, 88 (1943); *In Re Ruffallo*, 390 U.S. 544, 550-51 (1968); *Burlington Truck Lines v. U.S.*, 371 U.S. 156, 167 (1962); *Armstrong v. Manzo*, 380 U.S. 545 (1965); *Bouie v. City of Columbia*, 378 U.S. 347 (1964); *Shuttlesworth v. City of Birmingham*, 382 U.S. 87 (1965); *Chiarella v. U.S.*, 445 U.S. 222, 235 (1980); *Presnell v. Georgia*, 439 U.S. 14, 16 (1978); *McCormick v. U.S.*, ____ U.S. ____, 111 S.Ct. 1807, 1814 (1991); *Eaton v. City of Tulsa*, 415 U.S. 697 at 697 (1974); *Rewis v. U.S.*, 401 U.S. 808, 813 (1971). *Cf. also Morgan v. U.S.*, 304 U.S. 1, 20 (1938); *In Re Gault*, 387 U.S. 1, 33-34 (1967); *In Re Oliver*, 333 U.S. 257, 273 (1948). *See also Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 678 (1930).[1]

* * *

There are several important reasons why this Court should be disturbed enough by the Court of Appeals' actions to grant the Authority's petition for certiorari. The *McCummings* suit presented a state court with the opportunity to decide important Federal-Constitutional questions. This Court has an overriding interest in guaranteeing that State courts treat litigants who raise federal issues in State forums fairly and justly. That interest remains the same whether the litigants are civil rights claimants in southern courts seeking the equal protection of the laws (*see e.g. Bouie v. City of Columbia*, 378 U.S. 347 [1964]) or government agencies like petitioner who assert defenses that more "progressive" courts like the Court of Appeals might deem politically

[1]The following Circuit Court cases make the same point: *Evans Products v. West American Insurance Co.*, 736 F.2d 920, 923 (3rd Cir. 1984); *Quality CATV, Inc. v. NLRB*, 969 F.2d 541, 545 (7th Cir. 1992); *cf. Facet Enterprises v. NLRB*, 907 F.2d 963, 973 (10th Cir. 1990); *Rodale Press, Inc. v. FTC*, 407 F.2d 1252, 1256-57 (D.C. Cir. 1968); *Bendix v. FTC*, 450 F.2d 534, 536 (6th Cir. 1971); *NLRB v. Temple-Eastex, Inc.*, 579 F.2d 932, 936 (5th Cir. 1978).

incorrect. Aside from the interests of litigants, this Court also has its own institutional interests to vindicate whenever a state court acts, whether by design or otherwise, to strip this Court of the power to hear important Constitutional cases. (*See Florida v. Meyers*, 466 U.S. 380, 383 [(1984); Stevens, J., dissenting]).

The Court of Appeals' actions should also disturb this Court because the way in which the Court of Appeals disposed of the *McCummings* suit may represent part of a larger trend. Many state courts, dissatisfied with this Court's judicial philosophy have begun disposing of suits implicating federal constitutional issues in a way designed to strip this Court of the jurisdiction.

The Court is doubtless aware that under the rubric of the "new federalism" some state courts, especially New York, have begun to look to their own constitutions to discover rights which this Court, after diligently examining the United States Constitution has been unable to find. (*See e.g. People v. Rosen*, 81 N.Y.2d 237 [1993]; *Immuno AG. v. Moor-Jankowski*, 77 N.Y.2d 235 [1991].)

Whatever the merits of the doctrine (*see* Gardner, *The Failed Discourse of State Constitutionalism*, 90 Mich.L.Rev. 761 [1991]), one effect it has had is to strip this Court of the power to hear many state cases since this Court will not hear suits which were disposed of on *bona-fide*, independent state grounds. (*See Immuno AG., supra* at 256). A more insidious effect of the "new federalism" is to implant in the minds of state court judges the notion that the United States Supreme Court does not have the final say on questions of Constitutional law. If a state judge disagrees with a decision of this Court, he or she is now free to look to local constitutional law to chart out or invent new rights.

With these words as a background, the manner in which the court majority disposed of the *McCummings* case stands exposed in a clearer light. What follows is a hypothesis which, farfetched as it may first appear, explains better than any other why the Court of Appeals did what it did in *McCummings*.

Assume a state court like New York Court of Appeals, by now accustomed to short-circuiting appeals to this Court, has before it a case like *McCummings*. Dismissal of *McCummings* seems compelled by *Garner* but the Court of Appeals is of no mind to

dismiss.[2] How to go about affirming the judgment while at the same time blocking petitioner from challenging the Court's action by way of an appeal to the Supreme Court? The Court of Appeals might decide to affirm the judgment on the strength of a State Constitutional provision, but that course has its drawbacks. Were the Court of Appeals to invoke the state constitution, it would be required to explain at length why McCummings was owed greater rights under the New York Constitution than under the Federal Constitution's Fourth Amendment, a difficult task to perform in light of (1) New York's constitutional history (*see* Weissman, *People v. Torres and The Limits of the State Constitutionalism*, 24 Colum. J.L. & Soc. Probs. 299, Sec. IV, [1991]), (2) as well as the legislative history of New York Penal Law §35.30 (*see* New York Session Laws 1968, ch. 843; Liebowitz, *Justifiable Use of Force Under Article 34 of The Penal Law of New York*, 18 Buffalo Law Rev. 285, 286 (1968-69); Wukitsch, *Survey of the Law Governing Police Use of Deadly Force*, 55 N.Y.S.B.J. 12, 16 (1968-69). Then, too, the Court might draw the ire of some of its own members who have questioned the Court's promiscuous resort to the "new federalism" (*see e.g. People v. Vilardi*, 76 N.Y.2d 67 (1990); *Immuno AG., supra*).

What to do? Follow the less complicated course the Court did in *McCummings*. Affirm the judgment on "common law negligence" grounds—knowing that by doing so the odds of the United States Supreme Court agreeing to hear this case are greatly reduced. No other account plausibly explains why the Court of Appeals did what it did in the *McCummings* case.

Strong supporting evidence shows that the Court of Appeals, an aggressive champion of the "new federalism" may be more likely to decide a case in a way which strips this Court of jurisdiction, even at the cost of depriving litigants of due process. The Court of Appeals, it turns out, had already given the "McCummings protocol" an earlier dry-run. In *Patchogue Medford v.*

[2]The majority's sneering conclusion that *Garner* sets forth only a "minimum standard" of conduct brings to mind other New York cases where the Court of Appeals found that this Court's constitutional pronouncements did not come up to snuff (*see Immuno AG., supra* at p.248).

Bd. of Ed., 70 N.Y.2d 57 (1987) the court invalidated a random drug testing program on the ground that it violated *both* the federal and state constitution. The state constitutional challenge was made only in an *amicus* brief to the Court of Appeals, a fact which led Judge Simons to make these remarks:

> ". . . the court's reliance on the state provision is not only contrary to procedural rules—too familiar to require citation—which govern this court, but is also an inappropriate imposition on the respondents and their counsel who, after defending the Board's action against the only ground raised for some two years, now find the proceeding decided against them for reasons of which they were unaware and which they have no chance to address or refute." *Patchogue Medford* at p. 71.

None of this mattered to the Court's majority which was intent on expounding its own constitutional views, while resting its disposition on a nominally independent state ground, thus assuring that this Court would never challenge its views. The trend signalled by *McCummings* and *Patchogue, supra* may be expected to continue. As more state courts become converted to the "new federalism", they may become jealous of their newly established prerogatives. They may begin to view constitutional decision-making as falling within their own domain and will not hesitate to muscle out interlopers, like the United States Supreme Court by whatever means necessary, even at the expense of a litigant's due process rights.

Put differently, a state court intent on issuing constitutional pronouncements or shielding its decisions from Supreme Court review, may be more likely to do what the *McCummings* court did here: Decide a case which the litigants never actually tried, nor argued on appeal, and affirm a judgment on a theory which a defendant never had the chance to defend.

Conclusion

For these reasons a writ of certiorari should be issued to review the opinion and judgment of the New York Court of Appeals.

Respectfully submitted,

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September 1, 1993

APPENDIX.

APPENDIX A—Opinion of the New York State Court of Appeals (April 5, 1993).

COURT OF APPEALS

STATE OF NEW YORK.

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1 No. 32

BERNARD MCCUMMINGS,

Respondent,

v.

NEW YORK CITY TRANSIT AUTHORITY,

Appellant.

Lawrence Heisler, for appellant.

Joel A. Brenner, for respondent.

MEMORANDUM:

The order of the Appellate Division, insofar as it affirmed the judgment of Supreme Court should be affirmed, with costs[1].

[1]The appeal, insofar as it is taken from that portion of the Appellate Division order which affirmed the order of Supreme Court denying defendant's post-judgment motion to vacate and set aside the verdict and judgment, should be dismissed for nonfinality.

A jury awarded a verdict for personal injuries sustained by plaintiff who was permanently paralyzed from the mid-chest down when his spinal cord was severed by a bullet fired by Officer Rodriguez, an employee of defendant. The theory of plaintiff's case as submitted to the jury was common law negligence[2]—*i.e.*, that Officer Rodriguez, in employing deadly physical force in an effort to apprehend plaintiff, did not exercise that degree of care which would reasonably be required of a police officer under similar circumstances (*see, e.g., Flamers v. City of Yonkers*, 309 NY 114; *Herndon v. City of New York*, 43 AD2d 634, 635; Prosser and Keeton, Torts § 26, at 155-156 [5th ed]; 2C Warren's Negligence, § 1.01[2]). According to plaintiff's testimony and other proof, plaintiff was unarmed and running away from the scene of the attempted robbery when Officer Rodriguez shot him in the back. The Appellate Division affirmed with one dissent and granted defendant leave to appeal to this Court.

The principal question is a narrow one: whether the evidence in the record warrants the trial court's denial of defendant's dismissal motion made at the close of plaintiff's case and renewed at the close of the evidence. In deciding whether plaintiff has made out a *prima facie* case for submission to the jury, of course, a court must be "guided by the rule that the facts adduced at the trial are to be considered in the aspect most favorable to [plaintiff] and that [plaintiff is] entitled to the benefit of every favorable inference which can reasonably be drawn from those facts" (*Sagorsky v. Malyon*, 307 NY 584, 586). It is settled that negligence cases by their very nature do not lend themselves

[2]Plaintiff's second cause of action (for defendant's negligent screening, training and supervision of its employees) and his third cause of action (for violation of his fourth amendment rights brought under 42 USC § 1983) were both dismissed at the close of plaintiff's case.

to summary dismissal "since often, even if all parties are in agreement as to the underlying facts, the very question of negligence is itself a question for jury determination" (*Ugarriza v. Schmieder*, 46 NY2d 471, 474; *see also, Andre v. Pomeroy*, 35 NY2d 361, 364-365).

Here the evidence presents sharp factual issues. The key question—whether Rodriguez saw a violent crime in progress—is disputed. Plaintiff testified that when he was shot he had fled down a flight of stairs and was already some distance away from the scene of the attempted robbery and from Officer Rodriguez who was at the top of the stairs. Plaintiff stated that he was running *away from* Officer Rodriguez when Officer Rodriguez fired and hit him twice in the back. Officer Rodriguez, on the other hand, testified that the shooting occurred at the top of the stairs. Plaintiff and his companion, according to Rodriguez, were lunging *toward him* and only four feet away when he fired. Corroborating plaintiff's testimony are the following items of proof: plaintiff was shot in the back; blood was found only on the platform at the bottom of the stairs where plaintiff was lying; according to expert testimony plaintiff could not have run down the stairs after the bullet severed his spinal cord; both the victim and the officer accompanying Rodriguez testified that plaintiff did not lunge at Rodriguez. The victim himself testified that he was standing against the wall when the officers approached, and plaintiff fled down the stairs before shots were fired.

Defendant cites the Supreme Court's decision *Tennessee v. Garner* (471 US 1) and argues that that case, in some way, entitles it to a dismissal. But the rule in *Tennessee v. Garner* deals with the protections guaranteed by the Federal Constitution for the *person being arrested*—not for the arresting police officer or the municipality. It establishes the minimum standard of care which a police officer must exercise

in making an arrest to avoid violation of the arrestee's Fourth Amendment rights. Contrary to defendant's contention, *Tennessee v. Garner* does not create a limitation on plaintiff's right to recover or a shield of immunity for a municipal defendant in a common law negligence action. Even if the constitutional standard of care under *Tennessee v. Garner* were adopted as the precise standard for common law negligence, there would still be factual issues requiring a trial including, most significantly, whether it was reasonable for Rodriguez to believe that the use of deadly force was appropriate and necessary under the circumstances.

Nor, again contrary to defendant's contentions, is there any basis for dismissal under Penal Law § 35.30. Penal Law § 35.30 sets forth the circumstances when a police officer, charged with criminal conduct for using deadly physical force in making an arrest, can claim that the conduct was justified and, therefore, not criminal. The question of whether a police officer's conduct is justified in a criminal case is, of course, a factual matter for the jury. Similarly, if Penal Law § 35.30 were used as the sole measure of the standard of care required of Officer Rodriguez here, there would be triable issues for the jury including whether plaintiff could have reasonably believed that deadly force was appropriate and necessary under the circumstances.

Although the dissenters would have it otherwise, this is a negligence case governed not by federal law but by the common law of this State. In deciding the case we must, of course, take the view of the evidence most favorable to the plaintiff. The factual issues were sharply defined: whether Officer Rodriguez came upon the scene during or after the mugging; whether Officer Rodriguez saw any evidence that plaintiff had committed a violent crime; whether, firing from the top of the stairs, Officer Rodriguez hit the unarmed plaintiff in the back and severed his spinal cord while he

was running away at the bottom of the stairs or whether Rodriguez hit plaintiff while he was four feet away and lunging at Rodriguez. It was plaintiff's right to have these factual issues decided by the jury.

The fatal flaw in both dissents is their failure to view the facts in the light most favorable to plaintiff, which the law requires us to do. Instead, the dissent of Judge Bellacosa states that a team of officers "witnessed plaintiff McCummings rummaging through [the victim's] pockets as another mugger held him down in a choke hold" and that "[c]oncededly, [the victim] suffered bodily harm," while Judge Titone's dissent states the police officers "came upon what was clearly a mugging" with a scene that "left no room for doubt that a crime of violence * * * had just occurred." The dissents neglect the crucial fact that the most favorable view of the evidence for plaintiff is that Officer Rodriguez *did not see a mugging* and did not know whether a violent crime had been threatened or committed. Deadly force of course may be appropriate in some circumstances to prevent the flight of a violent felon. However, this record does not support the conclusion, as a matter of law, that deadly force was used for this purpose.

To be sure, plaintiff committed a crime but it is the province of the criminal, not the civil, justice system to punish him for his wrong. He has been convicted and will be dealt with as the law requires. In fulfilling our judicial responsibilities, we may not, as is suggested, depart from established principles of law to avoid what may to some seem to be an unacceptable resolution of the factual disputes.

Defendant's remaining contentions are either unpreserved or without merit.

TITONE, J. (dissenting):

I dissent. It is undisputed that the law permits police officers to use physical force, and even deadly physical force, when reasonably necessary to prevent the escape of a fleeing felon who has committed a violent crime. Nothing in the recent Supreme Court case law contradicts that obvious legal precept, whose vitality is so critical to the preservation of an orderly society (*see, Graham v. Connor,* 490 US 386; *Tennessee v. Garner,* 471 US 1). Since the archetypal facts in this case fit squarely and neatly within the contours of this fundamental axiom governing law enforcement's prerogatives, I would hold that the police officers' actions in this case were, as a matter of law, reasonable and that, accordingly, plaintiff's tort claim should not have been submitted to the jury.

Like my dissenting colleague Judge Bellacosa, I begin with the recognition that questions involving the reasonableness of a particular actor's conduct are ordinarily reserved for resolution by a trier of fact (*see, e.g., People v. Harrison,* 57 NY2d 470, 477-478; *Ugarriza v. Schmieder,* 46 NY2d 471, 475-476; *Andre v. Pomeroy,* 35 NY2d 361; *Sadowski v. Long Isl. R.R. Co.,* 292 NY 448, 455). However, this "established" principle of procedural law (*see,* slip op., at p 6) does not provide an automatic entree to a jury (*Andre v. Pomeroy, supra*). As we have noted on many occasions, the courts still have the duty to "make the threshold determination as to whether the plaintiff, by introducing adequate evidence on each element, has made out a case sufficient in law to support a favorable verdict" (*Basso v. Miller,* 40 NY2d 233, 241-242). Where such a threshold showing has not been made, "the case should go no further" and the claim should be dismissed "as a matter of law" (*Akins v. Glens Falls City School Dist.,* 53 NY2d 325, 332).

The need for thoughtful application of these principles with a view toward weeding out truly meritless claims is particularly acute in cases such as this involving claims of excessive force by the police. Confrontations between police officers and criminal suspects often—indeed, almost necessarily—involve an element of force. Thus, some clear boundaries for what does and does not constitute "reasonable" force must be delineated as a matter of law, lest every pursuit and arrest resulting in injury lead to a fully litigated tort case that must be submitted to a jury. The specter of civil juries regularly and routinely weighing the "reasonableness" of police conduct during the course of an arrest in much the same manner as they would weigh the reasonableness of an automobile driver's responses to a traffic situation is an unacceptable outcome, particularly in light of the likely chilling effect that such an outcome would have on the efforts of law enforcement personnel. In the presence of such weighty policy considerations, we should not be hesitant to dismiss claims of excessive force where the police conduct in question can readily be characterized, as a matter of law, as reasonable.

This case provides a classic illustration of when such a disposition is appropriate. Responding promptly to the 72-year-old victim's cry for help, the police in this case came upon what was clearly a mugging. What the officers saw and heard when they arrived at the scene left no room for

doubt that a crime of violence involving at least two attackers and a "lookout" had just occurred.[1] Further, as even plaintiff's evidence indicated, the attackers attempted to flee down a flight of steps and through a subway passageway as soon as they were alerted to the presence of the police. Given the immediacy of the occurrence, the clear risk of an escape into the labyrinthine subway system and the obvious need to act quickly and without reflection, I would conclude, without reservation, that the arresting officer acted reasonably *as a matter of law* when he fired his gun at the fleeing suspect in an effort to prevent him from eluding arrest and remaining free to commit other violent crimes against other innocent victims. Any other conclusion would cast a serious pall on the ability of the police to do the job society has assigned them: preventing crime and apprehending violent criminals.

BELLACOSA, J. (dissenting):

Affirming this plaintiff's $4.3 million jury award against the Transit Authority is not required or supportable under sound legal principles. This case should not be driven by general nostrums pertaining to ordinary negligence cases. Therefore, I respectfully dissent, vote to reverse the order of

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[1]It is true, as the majority observes (slip op., at p 6), that, according to plaintiff's evidence, Officer Rodriguez might not have actually seen the mugging. Nonetheless, even plaintiff acknowledges that the officers arrived at the scene in time to hear the 72-year-old victim's cries for help as well as the lookout's warning and to see plaintiff and his cohort fleeing down a nearby staircase. Under any view of the facts, those observations are sufficient to support a reasonable belief by the officer that a violent crime had just occurred and that the perpetrators were about to escape.

the Appellate Division, and would dismiss the plaintiff's case outright.

Plaintiff McCummings was one of the muggers who attacked Jerome Sandusky, 72 years of age, in the 96th Street-Eighth Avenue line subway station on June 28, 1984. A team of on-duty undercover transit police officers responded to Sandusky's cry for help, and witnessed plaintiff McCummings rummaging through Sandusky's pockets as another mugger held him down in a choke hold. Concededly, Sandusky suffered serious bodily harm.

On the most favorable view of the evidence to plaintiff, he was caught in the act of committing an all-too-common subway attack on a particularly vulnerable target of opportunity. He broke off from the attack only to avoid arrest by attempting to flee the crime scene after an alert from his lookout. The officer, who fired his weapon and seriously wounded the perpetrator-turned-plaintiff, testified that the plaintiff and another of the muggers, only several feet away, lunged at him when he rushed into the crime scene. The officer's attempt to rescue the victim and arrest the culprits consumed only seconds. As a defendant in the criminal proceeding, the plaintiff in this civil action pleaded guilty to robbery in the second degree. Ironically, his criminal sentence is capped by a multimillion dollar recovery against the citizenry at large.

The dispositive issue is whether the defendant City Transit Authority's motion to dismiss the excessive force civil claim by McCummings should have been granted. I conclude that the evidence irrefutably supports the view that the officer acted reasonably and without excessive force, as a matter of law, under Penal Law section 35.30, *Tennessee v. Garner* (471 US 1) and *Graham v. Connor* (490 US 386). Thus, I am baffled by the inversion of justice wrought in this case. The New York justification statute and the United

States Supreme Court precedents combine to create a special duty universe within which to assess the standard of care by which to measure the officer's response to an emergency violent crime situation.

That special duty universe involving municipal tort liability is ignored by the Court. Instead, it treats this case as a plain negligence claim governed by *pro forma* rubrics. The transit officers' paramount job was to stop the criminal assault and robbery, and to apprehend those committing the dangerously illegal acts in their presence. Indeed, that was the special obligation of this antimugger subway patrol unit. These are features which make this case different and call for distinct, realistic and proportionate rules of governmental responsibility and judicial review.

The fact that reasonableness of conduct, including that of municipal agents, is ordinarily a jury question (*see, Dunn v. State of New York,* 29 NY2d 313; *Stanton v. State of New York,* 26 NY2d 990, *rearg denied* 27 NY2d 817), does not compel the result here driven by procedural generalities. In effect, the "majority would again delegate to the jury the responsibility to determine the applicable social policy, thus abdicating the judicial role" (*Basso v. Miller,* 40 NY2d 233, 243 [Breitel, ChJ, concurring]).

This Court has expressly recognized that not every case in which the ultimate issue is reasonableness must end with a jury. The Court has instead manifested prudential suppleness in its substantive and procedural rules governing municipal liability. Thus, in *Akins v. Glens Falls City School District* (53 NY2d 325, *rearg denied* 54 NY2d 831), the Court found the question of a municipal duty of reasonable care resolvable as a matter of law. Similarly, in *Andre v. Pomeroy* (35 NY2d 361), this Court reversed an order of the Appellate Division and granted the plaintiff's motion for summary judgment that the defendant was negligent as a

matter of law. While the Court acknowledged the rarity of using summary judgment in negligence cases, it realistically ruled that the defendant's negligence was "conclusively established," since her behavior "could not be considered reasonable conduct under any standard and it does not take a trial to resolve that point" (*id.*, at 365). The Court's refusal to apply that principle here for another exceptional situation, on the opposite side of the liability spectrum, is rigidly uneven, because if negligence can be conclusively established as a matter of law on summary judgment, all the more should lack of negligence be susceptible to a directed verdict motion, after all plaintiff's evidence has been presented (*see also, Carter v. City of Chattanooga,* 803 F2d 217, *on rehg* 850 F2d 1119, *cert denied* 488 US 1010; *Pruitt v. City of Montgomery,* 771 F2d 1475, *rehg denied* 771 F2d 704; *Ramos Ayala v. Diaz Martinez,* 707 F Supp 75).

Since the eclipse of general municipal immunity, this Court has not shirked its common law responsibility of restoring appropriate policy-based barriers to otherwise open-ended municipal liability. In *Weiss v. Fote* (7 NY2d 579, *rearg denied* 8 NY2d 934), the Court determined that the State could not be held liable for the alleged faulty placement of a traffic signal. The Court recognized the exercise of municipal expert discretionary judgment in planning for the public safety as follows:

> Nothing in the legislative history of the Court of Claims Act * * * indicates that the waiver provision was designed to override the well-defined and carefully reasoned body of law governing the measure of the State's responsibility for highway safety. The city's defense which we here sustain rests not on any anachronistic concept of sovereignty, but rather on *a regard for sound principles of government ad-*

> *ministration and a respect for the expert judgment of agencies authorized by law to exercise such judgment. In the area of highway safety, at least, it has long been the settled view * * * that courts should not be permitted to review determinations of governmental planning bodies under the guise of allowing them to be challenged in negligence suits* (*id.*, at 588 [emphasis added]).

Realism in the realm of public safety is the touchstone of that case and its holding.

By contrast, the instant case approaches the surreal zone. It involves split-second decisions by public safety employees made in the most dangerous and volatile circumstances—here, transit officers rushing into ongoing, highly dangerous and violent criminal activity. These public safety employees are surely no less expert than city planners who decide, with relaxed reflection, where a stop sign or a traffic signal belongs. The *Weiss* rationale thus helps to support dismissal of this case and avoidance of counterproductive second-guessing exercises (*see, Dunn v. State*, 29 NY2d 313, *supra; Stanton v. State*, 26 NY2d 990, *supra*).

Allowing criminal defendants involved in the commission of violent felonies to reach civil juries as a matter of course on the issue of excessive force taunts the concepts of evenhanded justice. This plaintiff, a convicted mugger, can readily gain a lottery-size verdict against the public fisc while faultless citizen victims, like the elderly person in this case, are blocked from even their day in court for gross police nonfeasance under special duty municipal barriers (*contrast, Weiner v. Metropolitan Transp. Auth.*, 55 NY2d 175; *see, e.g., Kircher v. City of Jamestown*, 74 NY2d 251; *Merced v. City of New York*, 75 NY2d 798; *see also, Santangelo v. State*, 71 NY2d 393). The fact that some distinc-

tions emerge in cases involving various municipal duty categories underscores the need for a limiting analytical and dispositional path. Notably, our Court has also withheld negligence recoveries from injured persons, as matter of policy line drawing, when they assume certain risks (*see, e.g., Turcotte v. Fell*, 68 NY 2d 432; *Akins v. Glens Falls City School District*, 53 NY2d 325, *supra*). If nothing else, this plaintiff should be deprived of his windfall against the municipal pocketbook on the public policy and theory that he assumed the risk of his injuries as part of the hazards of his chosen predatory pursuits.

In *Tennessee v. Garner* (471 US 1, *supra*) and *Graham v. Connor* (490 US 386, *supra*), the United States Supreme Court set standards for the use of force to apprehend a suspect in a nonpersonal, property-type crime. *Garner* added, however, that "if the suspect threatens the officer with a weapon or *there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm*, deadly force may be used if necessary to prevent escape" (*supra*, 471 US, at 11). That is precisely this case. Thus, while the reasonableness inquiry is an objective one (*Graham v. Connor, supra*, at 397; *see also, People v. Goetz*, 68 NY2d 96), where, as here, the facts and circumstances fall even more compellingly within the template painted by *Garner*—a crime of force in actual progress against a person in a place of public transportation—the use of deadly force can be found to be reasonable and justifiable as a matter of law in a civil lawsuit context.

Furthermore, the Court's holding today undermines the Legislature's exceedingly plain policy on justification, expressed in the pertinent self-defense provision of the Penal Law, section 35.30:

> 1. A police officer or a peace officer, in the course of effecting or attempting to effect an arrest, or of preventing or attempting to prevent the escape from custody, of a person who he reasonably believes to have committed an offense, * * * may use deadly physical force for such purposes only when he reasonably believes that: (a) The offense committed by such person was: (i) a felony or an attempt to commit a felony involving the use or attempted use or threatened imminent use of physical force against a person;

That statute reflects, with *Garner,* the public policy that the use of deadly force to apprehend a criminal in the actual commission of or escape from a violent felony is unquestionably lawful and reasonable. Plaintiff conceded as much by his own evidence and theory in the civil case and by his plea of guilty in the criminal case. I cannot imagine a more precise tracking of the words and commands of Penal Law 35.30 than the actions taken by the officer on this subway platform.

The Court disregards the statute's and *Garner's* cogent relevancy by sidetracking the procedural context of the situation. Moreover, its characterization of the pertinent rule as a one-way proposition benefitting only criminal actors is puzzling. *Garner,* like this case, was a civil suit for damages sustained as a result of the alleged use of excessive force in apprehending a suspect. The United States Supreme Court plainly intended that its Fourth Amendment analysis for assessing the lawfulness of the use of deadly force should also be applied to the issue of reasonableness of the actions of the law enforcement officials and their municipal superiors (*Tennessee v. Garner, supra,* 471 US, at 22). In now holding that the standard enunciated in *Garner* applies

only to the issue of the "arrestee's Fourth Amendment rights" (Majority opn, at 4), the Court wastes *Garner's* guidance. The anomaly inflicted is that "[t]he imposition of such liability, in addition to posing a crushing financial burden, might well discourage" law enforcement officers and their superiors from acting to promote the general welfare (*O'Connor v. City of New York*, 58 NY2d 184, 191, *rearg denied* 59 NY2d 762). Tort law, after all, is intended to shape and conform conduct to reasonable patterns.

In sum, the application in this case of staple negligence nostrums of a procedural and substantive variety will result in inappropriate cases being universally pitched to juries, whose potentially excessive determinations are beyond this Court's review powers on almost all issues. As foreseen in *O'Connor v. City of New York* (*id.*), the devastating toll includes shifting the primary concern of law enforcement employees from ensuring the safety of the public to ensuring that they and their municipal employers are not exposed to staggering money judgments for, in effect, doing their jobs of crime prevention. The costs to society of such calculated indifference to innocent citizens in dire need are compounded by the payments of large judgments out of a diminishing public purse. This case guarantees that society will suffer the double albatross of both those costs. This plaintiff-mugger may have been interrupted and prevented from stealing Sandusky's wallet, but he ultimately makes crime pay by picking the public's pocket for the big score of 4.3 million dollars, plus interest.

* * *

Order, insofar as it affirmed the judgment of Supreme Court, affirmed, with costs, in a memorandum. Appeal, insofar as taken from that portion of the Appellate Division

order which affirmed the order of Supreme Court denying defendant's post-judgment motion to vacate and set aside the verdict and judgment, dismissed upon the ground that that portion of the order does not finally determine the action within the meaning of the Constitution. Chief Judge Kaye and Judges Simons, Hancock and Smith concur. Judge Titone dissents in part and votes to dismiss the appeal in part and reverse in part in an opinion. Judge Bellacosa separately dissents in part and votes to dismiss the appeal in part and reverse in part in an opinion.

Decided April 5, 1993

APPENDIX B—Opinion of Supreme Court, Appellate Division, First Department (February 20, 1992).

SUPREME COURT, APPELLATE DIVISION

First Department, April 1991.

John Carro, J.P.
E. Leo Milonas
Betty Weinberg Ellerin
David Ross
Israel Rubin, JJ.

BERNARD MCCUMMINGS,

Plaintiff-Respondent,

against

NEW YORK CITY TRANSIT AUTHORITY,

Defendant-Appellant.

43114-15

Appeal by the defendant-appellant from a judgment of the Supreme Court, New York County (Leonard N. Cohen, J.), entered on March 8, 1990 which, following a jury trial, found in favor of the plaintiff and awarded damages in the total amount of $4,343,721.24, and from an order of

said court entered on May 14, 1990 which denied defendant's motion to set aside the verdict.

Joel A. Brenner, of counsel, (Jonathan Cory Scott with him on the brief; David Breitbart, attorney) for plaintiff-respondent.

Lawrence Heisler, of counsel, (Anita Isola and Lawrence A. Silver with him on the brief; Albert C. Cosenza, attorney) for defendant-appellant.

MILONAS, J.

At approximately 8:00 P.M. on June 28, 1984, Jerome Sandusky was attacked by a number of youths in the 96th Street station of the Eighth Avenue subway line in the course of an abortive robbery attempt. Two Transit Authority police officers, Christine Mead and Manuel Rodriguez, who were on undercover patrol, heard the elderly victim's screams and came to his assistance. As the officers approached the staircase with their guns drawn, one of the culprits, Nathan Woods, evidently acting as the lookout, yelled "Yo". Two other perpetrators, Jacob Wise and plaintiff Bernard McCummings, were on top of Sandusky at the lower level, the former with a choke hold around the victim's neck and defendant rummaging through his pockets; some of Sandusky's belongings were strewn about the floor. The parties offered differing versions as to what transpired next. According to Officer Rodriguez, he identified himself, shouting, "Police don't move", but both Wise and plaintiff lunged at him, thereby causing him to discharge five shots. Two of the bullets struck McCummings in

the back, one severing his spine and rendering him a paraplegic.

McCummings admitted that he was engaged in robbing and beating Sandusky but claimed that after being alerted by Woods' signal, he broke off the assault and fled down the other staircase in the opposite direction. He stated that he was some seventeen to twenty feet away from Officer Rodriguez when he was shot in the back. Plaintiff denied that he ever lunged at the officer. Plaintiff's medical expert testified that McCummings' spinal cord was immediately transected and that he instantly lost all weight bearing capability, and since he was found at the bottom of the stairs that is where he was shot. Defendant offered no credible medical evidence to the contrary. Officer Rodriguez asserted that despite plaintiff's wounds, plaintiff was able to run down a stairway before collapsing. On the direct examination of Officer Rodriguez, the jury heard him testify about three prior incidents involving the use of his firearm. The shootings were found to be "justified" by the Transit Authority. Officer Rodriguez twice before shot at fleeing suspects and missed, the first time firing twice, the second time emptying his gun. On another occasion, Officer Rodriguez shot and killed a stray dog which was apparently rummaging through his garbage can.

The jury, clearly accepting McCummings' account of the incident, found that Officer Rodriguez had used excessive force against plaintiff, who had previously pleaded guilty to robbery and spent some three years incarcerated in state prison. The panel then awarded him a total of $2.5 million for past and future pain and suffering, $622,142.55 for future medical supplies and equipment and $1.2 million for future nursing and other home care services. In that regard, it should be noted that the evidence demonstrates that one of the bullets that entered from the back and transected his

spine caused total paralysis from the mid-chest down, resulting, among other things in complete and permanent loss of urinary, bowel and sexual function. On appeal, defendant New York City Transit Authority has advanced a series of contentions which have either not been preserved or do not constitute reversible error.

Defendant urges that the action should have been dismissed pursuant to Penal Law 35.30 and the decision of the United States Supreme Court in *Tennessee v. Garner*, 471 U.S. 1, or alternatively, that the holding in that case is not germane to the instant situation and, in any event, should not have been retroactively applied to this matter. Yet, since defense counsel not only did not object to reliance upon *Tennessee v. Garner, supra*, but acknowledged that *Garner* is both controlling and retroactively applicable, defendant may not for the first time before this court endeavor to disclaim the relevance and applicability of *Garner* (CPLR 5501[a][3]; *De Long v. County of Erie*, 60 NY2d 296, 306; *Derdiarian v. Felix Contracting Corp.*, 51 NY2d 308, 317). Similarly, the Transit Authority failed to advise the trial court that it deemed it improper to charge the jury pursuant to the standard of reasonableness of an officer's conduct as enunciated in *Tennessee v. Garner, supra*, and defendant may not now advance such an argument on appeal (CPLR 4110-b). Defendant's assertion of qualified immunity is also precluded as not having been preserved and even on the merits is without substance inasmuch as the Transit Authority could be liable under the doctrine of *respondeat superior* (*Frazier v. State of New York*, 64 NY2d 802).

In *Tennessee v. Garner, supra*, the Supreme Court declared that "[t]he use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape. Where the suspect poses no

immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so" (at 11). Therefore, in the view of the Court therein, where "the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force" (at 11). One indicator cited by the Court as illustrative of the danger presented by the suspect is whether he menaces the officer with a weapon.

It is significant that defendant never challenged the legal validity of any portion of the trial court's lengthy charge concerning the use of physical force by a police officer. Defense counsel merely requested that the court read to the jury the actual language of Penal Law 35.30, as well as a specific paragraph in *Tennessee v. Garner, supra,* notwithstanding that the statute and the Supreme Court ruling had been exhaustively explained to the members of the panel. The Transit Authority, insisting that Officer Rodriguez had no way of knowing whether or not the perpetrators were armed, appeared to believe that quoting from the subject Penal Law section and legal authority, could somehow benefit the defense's position but, as the trial judge pointed out, Officer Rodriguez testified that the assailants' arms were outstretched and lunging at him without being in possession of any deadly weapons. Indeed, to the extent that the court provided an advantage to either party, it was more likely to have been to defendant than plaintiff by, for example, emphasizing that the burden of proof rested upon the plaintiff with respect to each and every element relating to the officer's use of deadly force.

Defendant also complains that the court improperly permitted the jury to consider the Transit Authority's 1982 and 1986 rules and regulations. First, it should be pointed out

that defendant's attorney never protested the admission of the 1982 regulations nor ever moved that they be stricken. If anything he acquiesced in their introduction into evidence and even affirmatively utilized these regulations in examining various witnesses both on direct and cross. Not until the precharge conference did defendant's lawyer assert that the 1982 regulations imposed a higher standard than the Penal Law or *Tennessee v. Garner, supra*, and that they not be included in the jury instructions. Although the court denied the request, it stated that it would merely direct the panel to consider the regulations in deciding whether or not Officer Rodriguez acted with a reasonable belief that he was justified in the use of deadly force, and this is what was done. Defendant, in its appellate belief, concedes that it did not object to the admission of 1982 rules and regulations but argues disingenuously that they were only relevant as to claims subsequently dismissed (such as the allegation that the Transit Authority had negligently failed to train its officers regarding the appropriate use of deadly force) and, thus, not submitted to the jury. Yet, this is not a distinction ever put forward by defendant to the court; its only concern appeared to be with the standard for employing deadly force.

Further, contrary to defendant's contention that the 1982 regulations set more stringent requirements than otherwise mandated by statutory or case law (see *Lesser v. Manhattan and Bronx Surface Transit Operating Authority*, 157 AD2d 352, which held that internal operating rules must be excluded if they compel a standard transcending reasonable care), they do no more than authorize transit authority officers to apply deadly physical force in response to a felony involving or threatening physical force. The 1982 regulations provide in pertinent part that:

> The minimum level of force will be used whenever preventing or terminating a crime, or when arresting a person for a crime. A firearm or other deadly physical force will only be used when any other level of force is insufficient to effect police control of a felony involving physical force or imminent use of physical force against oneself or another.

Not only did the foregoing rule not impose a stricter standard but it largely follows the dictates of Penal Law 35.30. Equally noteworthy is that Captain John Doyle of the Manhattan-Bronx Task Force and defendant's own witness, testified that the Supreme Court ruling in *Tennessee v. Garner, supra,* actually limited the reliance upon force; therefore, the 1982 regulations had to be amended to raise the degree of care to that necessitated by *Garner.* Accordingly, defendant's position with regard to the 1982 regulations is simply unsupportable.

As for the 1986 regulations, which were promulgated in direct response to *Tennessee v. Garner, supra,* the court, over the Transit Authority's objection, initially allowed their introduction during the recross-examination of Captain Doyle because it had concluded that defense counsel had "opened the door." Thereafter, lawyers for both parties had Captain Doyle read from and interpret the regulations. The next day, defendant unsuccessfully moved for a mistrial due to the admission of the 1986 regulations. Plaintiff's attorney agreed to withdraw them from evidence, and the court, striking from the record all reference to these rules and regulations, charged the jury that it disregard any testimony relating to the 1986 regulations (the panel was never supplied with the regulations themselves). While delivering its final instructions to the jury, the court again advised against considering any evidence that had previously been stricken.

There is absolutely no basis here to find that the jury did not comply with the court's curative instructions or that the testimony involving the subject regulations was so damaging so as to taint the entire trial even if the jurors had failed to follow the judge's admonition.

The dissent's difficulty in accepting the meaning of *Tennessee v. Garner, supra,* is demonstrated by the implied criticism directed against the reasoning of the majority of the United States Supreme Court therein. Yet, notwithstanding the dissent's apparent dissatisfaction with *Tennessee v. Garner, supra,* defendant not only never challenged its applicability but, instead, accepted that the ruling in that case was controlling here. Indeed, the requests for charge which were submitted to the judge by the parties were exchanged in advance, and defendant certainly had the opportunity to present his own requests and to contest plaintiff's proposal. Yet, an examination of the recharge conference conducted by the court reveals that defendant agreed with the judge's entire proposed jury instructions, except in one particular. Thus, the following conversation occurred between the court and the parties' counsel.

> THE COURT:. . .With respect to five, request five—do you have any objection if I should define—I don't know why I have to define "serious physical injury."
>
> MR. SIERADZKI [plaintiff's attorney]: That would only have applied had you used the language of *Garner,* which makes reference to serious physical harm or injury, to define that term would have some meaning. But since you're not using that term—
>
> THE COURT: I will be using that term.

MR. SIERADZKI: Then it should be defined. The jury has the right to know.

THE COURT: I will be using the term of a deadly weapon. A police officer is defending himself or believes that it's necessary to defend himself from what the officer reasonably believes the use or imminent use of deadly physical force. I will add "or serious physical harm."

MR. SIERADZKI: Then you should define that, too.

There is a Penal Law definition in the 1984-85 Penal Law, which you're reading to them from 3530 [*sic*].

MR. KUZMACK [defendant's attorney]: I would submit, your Honor, that we don't know what the *Garner* Court meant by "serious physical harm."

MR. SIERADZKI: We can interpret *Garner.*

If we're interpreting it in New York, for purposes of a New York trial, then you have a right to interpret a Federal Court which interprets a Tennessee statute, so that it applies to a New York statute.

MR. BREITBART [plaintiff's other attorney]:That's the definition in the New York Panel Code.

THE COURT: Well, that may not be the definition of "serious physical injury" under the civil statutes of the no-fault threshhold civil statutes.

MR. KUZMACK: That's correct, your Honor.

THE COURT: It's an entirely different thing.

MR. BREITBART: We're talking about 3530[*sic*], which is a penal statute.

THE COURT: That's true.

MR. SIERADZKI: And we're using the Penal Law to define that penal statute term.

How can you use a civil statute term to define a penal statute?

THE COURT: It's also defined differently now. It's in here somewhere.

MR. SIERADZKI: I read it.

(Discussion off the record)

THE COURT: I will also charge this, referring to five.

I will define "serious physical injury."

MR. KUZMACK: Respectfully except, your Honor.

Defendant's attorney did not, significantly, offer a suggestion for a possible alternative charge or even explain the precise reasons for his objection. Yet, pursuant to CPLR 4110-b:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court, out of the hearing of the jury, shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict stating the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

Moreover, CPLR 5501(a) (3) limits review by the Appellate Division to ". . . any charge to the jury, or failure or refusal to charge as requested by the appellant, to which he objected." Thus, it is axiomatic that a purported error in a judge's charge is not preserved for review unless it is clearly

brought to the court's attention prior to the case being sent out for consideration by the jury (*De Long v. County of Erie, supra; Derdiarian v. Felix Contracting Corp., supra*), and an objection is deemed waived if it does not unambiguously and explicitly apprise the court of the alleged error and expressly request the pertinent charge sought (*Moore v. Leaseway Transportation Corp.*, 49 NY2d 720; *DiSalvo v. Bortle*, 58 AD2d 997; see also Weinstein, Korn & Miller, 4 New York Civil Practice, CPLR 4017). As the court clearly observed in *Petosa v. City of New York*, 52 AD2d 919, the objection to a charge "must state the matter to which objection is being made and the grounds for such objection. A general objection is not sufficient where the correct charge might have been obtained by specifically calling to the trial court's attention the alleged error and the reason for such error" (at 920). Therefore, the defense lawyer's unadorned "[r]espectfully except, your Honor" was scarcely adequate to preserve for review the single disagreement which he voiced with the court's proposed jury instructions.

Ironically, the minutes of the precharge proceedings reveal that the court spent considerable efforts to prune plaintiff's request to charge, often at defendant's request and over the expressed dissatisfaction of plaintiff's counsel. Specifically, the court granted in its entirety (except for one minor item not in issue on appeal) defendant's request to charge, stating that "[w]ith respect to defendant's request to charge, I will charge everything here". The rules of preservation serve the salutary purpose of giving fair notice to the trial court and to the adverse party of the claimed error and the proposed solution. Allowing a party to seek reversal on appeal on an unpreserved error is inherently unfair both to the jurist whose conduct is being reviewed and to the adverse party who had no meaningful way to respond to the claimed error. This is especially so where, as here, during an

extensive charge conference defense counsel claimed ignorance on the law and stood mute when plaintiff's proposed charge relating to "serious physical harm" was being analyzed and negotiated. Furthermore, the court, most significantly, granted defendant's request to charge in its entirety.

Defendant's claim that the judge erred in not reading as a whole section 35.30 of the New York Penal Law is similarly not preserved for appellate review. On several occasions, in two separate charge conferences, the court advised the attorneys that he agreed with their assessment that the case was controlled by section 35.30 of the New York Penal Law and *Tennessee v. Garner, supra*. He stated that he would not read the statute but would charge its substance, as well as the holding of *Tennessee v. Garner, supra*, and that he would "paraphrase" the statute. Defense counsel did not object to this ruling and did not specifically request the reading of the statute in his extensive request to charge. Defendant did offer his own version of the Penal Law and *Tennessee v. Garner, supra*, in his written request to charge, and this was in fact incorporated at length into the judge's charge to the jury. Defendant's request to read section 35.30 came for the first time after the judge's charge and when the jury was about to deliberate. Nowhere in the record, however, is there a single objection pointing to any claimed error in the charge relating to the Penal Law section or any suggestion as to how or where the court may have gone astray. The judge's position was that his charge was "[s]ubstantially consistent with the Penal Law Sections". Since defendant failed to point out to the court where it had erred, it must be assumed that the court was correct.

As for the criticism raised by the dissent concerning the court's charge as to what "level" of force was reasonable or excessive, it is notable that defendant did not assert this at trial. Moreover, in a Second Circuit case, *Heath v. Henning*,

854 F.2d 6, cited by the dissent, the court reversed a jury verdict in favor of defendant police officers because the court had used an incorrect standard in instructing the jury on the officers' use of deadly force in effecting an arrest and remanded the matter for a new trial. According to the Second Circuit, which relied both on *Tennessee v. Garner, supra,* and section 35.30 of the New York Penal Law, "[t]he legal standard to be applied in cases where a police officer has used deadly force against a fleeing felony suspect is one of reasonableness under the Fourth Amendment" (at 8), and "[t]he proper standard requires that a jury consider whether the officers acted reasonably, under the totality of the circumstances, in using deadly force to effect the arrest" (at 9).

It is evident that the "level" of force which may be employed by officers is that which a jury regards as reasonable under the circumstances of the particular case. Defendant never disputed that this was an issue to be resolved by the jury at trial. The defense attorney specifically acknowledged that "the justifiableness of a shooting can only be judged by legal standards. The legal standards are 3530[*sic*], the Penal Law, and *Tennessee v. Garner.*"

The issues which the jury had to determine are minimized by the truncated version offered by the dissent as the "central question." Throughout the trial there were two distinct and conflicting scenarios offered by the parties. According to the court, "as I see it, it is the plaintiff's claim that the shooting occurred while the plaintiff was unarmed, had already fled, had already released the victim and already fled down the stairway and was shot in the back at the bottom of the stairway. That is the plaintiff's claim. . . . On the other hand, the defendant's contention is that the shooting did not occur that way at all." Defendant's lawyer then responded, "No, your Honor. It occurred

because the police officer was threatened with serious physical injury, and that he fired two shots at McCummings, and McCummings was shot while standing on the landing and that he ran down the stairs after being shot." The parties agreed that it was a clear matter of fact for the jury as to whether "the plaintiff was shot while lunging at the officer and that the officer was reasonable to believe he was in fear of his life or that deadly physical force was being used against him, or whether he was shot escaping" (stated by Mr. Kuzmack, the defense counsel).

One must discard or severely edit both fact versions developed by the testimony at trial to form the "central question" offered by the dissent, i.e. "[w]hether an officer employed by the defendant New York City Transit Authority used excessive force by shooting plaintiff McCummings in order to effect his apprehension while in the immediate flight from the mugging of an elderly man." Yet, even viewing the issue as stated, the inexcapable conclusion is that it still poses many questions for resolution by the jury, and, as described by the dissent in discussing the difficulties in attempting to interpret and apply the ruling of *Tennessee v. Garner, supra*, "[t]he conclusion to be drawn is that *Garner* contemplates that such an assessment will be made *ad hoc*, based upon the facts presented", and "[i]ndeed the courts that have confronted the problem seem to have adopted this perspective." This is precisely the role that the jury fulfilled in this case.

The dissent endeavors to set up a straw man, never even suggested by defendant, to the effect that plaintiff is seeking recovery on both Fourth Amendment and tort grounds and that these doctrines are separate and distinct and mutually exclusive. Thus, almost everything involved in this case is now tainted by the "confusion" surrounding these two contradictory claims, particularly the instructions delivered to

the jury regardless of whether or not actually objected to by the defense. This does not, however, prevent the dissent from recommending remand of this case for a new trial in which the jury would presumably decide whether Officer Rodriguez acted reasonably under the circumstances therein, precisely what he deems to be a matter of constitutional interpretation but which is, in reality, a question of fact. While the courts do establish constitutional standards, it is the jury which determines if the particular conduct in dispute comported with these standards. The jury is certainly not being called upon to make constitutional rulings as such. Further, since tort claims may clearly arise out of the violation of constitutional rights, there is no conflict between the two theories. They are simply different concepts, and the dissent has confused their meaning and application. The dissent, similarly, appears to perceive a potential discord between the New York State Penal Law and current judicial interpretation of the Fourth Amendment. Yet, defendant evidently does not share his concern and has never asserted this proposition. There is certainly no legal authority to support such a possibility.

The errors claimed in the charge which are raised by the defendant or *sua sponte* by the dissent are either nonexistent or insignificant and unpreserved. A reversal by this Court would require a rejection of the jury's fact-finding and its replacement with our own or penalizing the wrong party for unpreserved error. Either result would be a serious deviation from, and an abuse of, the authority which this court has on review.

Finally, as the Court of Appeals stated in *Caldwell v. The New Jersey Steamship Company,* 47 NY 282 (at 286-287):

> Where a legal proposition is presented for prompt decision, in such a variety of forms, with slight

> variations of language, it would be extraordinary if expressions could not be found which, considered separately, would not be obnoxious to criticism; but an appellate court will not seize hold of isolated portions of a charge for that purpose. If the charge, as a whole, conveyed to the jury the correct rule of law, on a given question, the judgment will not be reversed, although detached sentences may be erroneous; and if the language employed is capable of different constructions, that construction will be adopted which will lead to an affirmance of the judgment, unless it fairly appears that the jury were, or at least might have been, mislead.

Consequently, the judgment of the Supreme Court, New York County (Leonard N. Cohen, J.), entered on March 8, 1990, which, following a jury trial, found in favor of plaintiff and awarded him damages in the total amount of $4,343,721.24, should be affirmed, without costs or disbursements. Order of the Supreme Court, New York County (Leonard N. Cohen, J.), entered on May 14, 1990, denying defendant's motion to set aside the verdict, is affirmed without costs or disbursements.

> All concur except Rubin, J. who dissents in an Opinion.

RUBIN, J. (dissenting)

The central question in this case is whether an officer employed by defendant New York City Transit Authority used excessive force by shooting plaintiff McCummings in order to effect his apprehension while in immediate flight from the mugging of an elderly man. The leading case in

this area is *Tennessee v. Garner* (471 US 1), and while there is no substantive dispute as to its relevance, the scope of its application under the markedly different factual circumstances and statutory context of this case is sharply contested. Even the procedure by which a statutory provision is examined under the reasonableness standard enunciated in *Garner* is unsettled at this time. Given the potential exposure to liability (the judgment awarded in this case exceeds $4.3 million), the novelty of the legal issues presented and their significance to law enforcement, it is appropriate that the courts take a measured approach to their resolution.

I regard the *Garner* case as a narrow ruling with considerably more limited application than is perceived by the majority of this court and by other courts which have construed it. As I view the opinion, *Garner* imposes an external limit in circumstances where a resort to force authorized under state law leads to a constitutionally unreasonable result. I consider the New York State law on justification (Penal Law Article 35) to be a fair and comprehensive statute, consistent with the Fourth Amendment reasonableness considerations articulated in *Garner*, which can be expected to produce a constitutionally acceptable result in the vast majority of situations to which it is applied.

I am also of the opinion that, while the *Garner* Court abandoned, as arbitrary the common-law distinction between felony and misdemeanor as a criterion for the use of deadly physical force, it did not abandon the distinction between the seriousness of crimes (particularly as reflected in their violence) which the common law endeavored to reflect. In this regard, I do not apprehend *Garner* as inviting or requiring a wholesale reassessment of which criminal acts are violent or dangerous in their commission.

Transit Officer Manuel Rodriguez was on plain clothes patrol with his partner, Christine Mead, at the 96th Street

subway station on the "A" line. They observed Bernard McCummings and his accomplices, Nathan Woods and Jacob Wise, acting suspiciously in the subway station but, at the time the assault took place, the officers had gone up to the street to avoid attracting the attention of the trio. Woods, who acted as lookout, positioned himself at the top of a stairway while McCummings and Wise carried out the assault on the landing, halfway down to the platform level. The victim, nearly 72 years of age, was punched in the face and choked by one assailant, Jacob Wise, while McCummings removed his watch, his wallet and the loose change from his pockets. Officer Rodriguez heard the victim's cries for help and encountered this scene as he ran down the subway steps (although whether during or immediately after the assault is a factual issue), followed closely by Officer Mead. According to the victim's testimony, Officer Rodriguez announced, "Drop him and freeze," whereupon the three culprits fled. (Rodriguez and his partner testified that he shouted, "Police, don't move,") Officer Rodriguez discharged five shots, two of which struck McCummings in the back, causing injury to the spine and rendering him a paraplegic. Another bullet struck his accomplice, Jacob Wise, in the upper right arm. McCummings collapsed at the bottom of the stairway and was arrested at the scene. Jacob Wise escaped Officer Mead's pursuit and was later arrested at the emergency room of St. Luke's Hospital where he had sought treatment for his gunshot wound. Nathan Woods also ran from the scene and was later arrested by members of the Major Case Investigation Unit, acting on information supplied by Jacob Wise. Bernard McCummings subsequently pleaded guilty to attempted robbery in the second degree (Penal Law §160.10) which is a violent felony offense (Penal Law §70.02[1]). The Firearms Discharge Review Committee of the New York City Transit Police Department

ruled that the shooting was "justified and within department guidelines."

At issue on this appeal is whether the jury was properly instructed on the criteria to be applied in determining if the shooting of McCummings was justified or if it represented an excessive use of force by the police officer. Defense counsel, in objecting to the court's instructions (R 1689; 1909), urged that the relevant factors to be considered by the jurors are found in Section 35.30 of the Penal Law, which permits an officer to use deadly physical force when he reasonably believes it to be necessary to prevent flight and "when he reasonably believes that: (a) The offense committed by such person was: (i) a felony or an attempt to commit a felony involving the use or attempted use or threatened imminent use of physical force against a person".

McCummings' claim against the New York City Transit Authority states three causes of action alleging, respectively, excessive use of force, negligent training and supervision and violation of rights under the United States Constitution. The IAS Court dismissed the cause of action for negligent training and supervision at the close of plaintiff's case. The remainder of the action is founded upon the United States Supreme Court's decision in *Tennessee v. Garner* (471 US 1, *supra*), an action brought pursuant to 42 USC §1983 claiming a violation of the plaintiff's civil rights. That action arose out of the fatal shooting by a police officer of an unarmed, 15-year-old suspect for the sole purpose of preventing his flight following the burglary of a private residence. The Supreme Court, recognizing that circumstances exist where the use of deadly force against a fleeing felon is justified, ruled that the Tennessee statute was constitutional on its face but was unconstitutional as applied to the facts before the court.

Because there is general agreement between the parties to this case that *Garner* is dispositive of the issue presented, it is appropriate to analyze the opinion more closely to determine its impact upon State law. Its holding is that a statute which permits "[t]he use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable" under the Fourth Amendment (471 US 1, 11). Applying this concept to the facts before it, the majority stated, "A police officer may not seize an unarmed, nondangerous suspect by shooting him dead" (*Id.*). From the Court's discussion of the common law, it is clear that the rationale supporting this conclusion is that the distinction between felony and misdemeanor as a predicate for the use of deadly force is no longer viable. "In short, though the common-law pedigree of Tennessee's rule is pure on its face, changes in the legal and technological context mean the rule is distorted almost beyond recognition when literally applied" (471 US 1, 15). The unadorned rule is, therefore, that deadly force may not be employed to apprehend a suspect solely because the crime for which he is sought is classified as a felony.

The result follows readily from the facts as perceived by the majority of the Court. Edward Garner was a 15-year-old eighth-grader, 5 feet 4 inches tall and weighing between 100 and 110 pounds, who stole $10, a ring and a purse from a house (471 US 1, 4, N2 & 4). No one was home at the time of the burglary which, the opinion stresses, is classified by the F.B.I. as a "property" crime and not a "violent" crime (471 US 1, 21). The majority was convinced that the officer who shot Garner did not fear for his personal safety, recognized the suspect was unarmed and fired at him only because Garner was climbing a fence and about to get away (471 US 1, 21). Even conceding the legitimate governmental interest in law enforcement, including the goals of effec-

tiveness in making arrests and encouraging the peaceful submission of suspects, the majority stated, "we are not convinced that the use of deadly force is a sufficiently productive means of accomplishing them to justify the killing of nonviolent suspects" (471 US 1, 10).

In place of the common-law distinction between felony and misdemeanor, *Garner* derives justification for the use of deadly force from the *danger* which the fleeing suspect represents. Examining the facts before it, the Court concluded, "Although the armed burglar would present a different situation, the fact that an unarmed suspect has broken into a dwelling at night does not automatically mean he is physically dangerous" (471 US 1, 21). The indicia of "dangerousness" which the majority consider appropriate are stated in the alternative: "Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon *or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm,* deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given" (471 US 1, 11-12 [emphasis added]).

Because it was confronted with a *nonviolent* felony perpetrated by an unarmed 15-year-old, the Court in *Garner* focused its attention on whether the fleeing suspect presented a threat of imminent harm *to the apprehending officer* and to bystanders. It should be readily apparent, however, that where a suspect poses a threat of serious injury to an officer or others, it is irrelevant that he may have committed a predicate felony, a misdemeanor or no crime at all because deadly physical force may be employed to neutral-

ize the threat, as a matter of self-defense of the officer or protection of the public (*see*, Penal Law §35.30[1][c]). Because of the gross factual dissimilarity to the case at bar, the guidance provided by *Garner* is limited to the result that the time-worn distinction between felony and misdemeanor as a basis for the use of deadly force has been supplanted by the distinction between crimes "involving the infliction or threatened infliction of serious physical harm" and crimes of lesser violence.

The dissenting Justices in *Garner* complained that the majority failed "to outline the additional factors necessary to provide 'probable cause' for believing that a suspect 'poses a significant threat of death or serious physical injury' * * * when the officer has probable cause to arrest and the suspect refuses to obey an order to halt" (471 US at 32). The majority opinion does not discuss the newly-formulated rule and no examples of crimes which warrant the use of deadly force to apprehend a suspect are provided. The Court does not supply a definition of the term "serious physical harm". There is no discussion of the public policy to be advanced by allowing police officers to shoot those suspected of more violent crimes to effect their arrest while permitting those suspected of less violent crimes to escape. Nor does the Court articulate the nature of the danger posed by the escape of a violent felon, although some indication may be gleaned from a footnote concerning a difference of opinion with the three dissenting Justices over the relevance of certain statistics. In dismissing their significance, the majority state, "That has nothing to do with the question here, which is whether the fact that someone has committed a burglary indicates that he has committed, *or might commit, a violent crime*" (*Tennessee v. Garner, supra*, at 22, n 23 [emphasis added]). The Court does, however, acknowledge the problems attendant upon application of the formulated

rule by officers in the field, stating, "We do not deny the practical difficulties of attempting to assess the suspects dangerousness" (471 US 1, 20).

The conclusion to be drawn is that *Garner* contemplates that such an assessment will be made ad hoc, based upon the facts presented, allowing the process of the common law to refine the concept of dangerousness through accumulated precedent. Indeed, the courts that have confronted the problem seem to have adopted this perspective. For instance, in *Heath v. Henning* (854 F2d 6, 9 [2d Cir 1988]), the court ruled that *Garner* required consideration of "whether the officers acted reasonably, under the totality of the circumstances, in using deadly force to effect the arrest * * *. While the Fourth Amendment test does take into account the officer's knowledge, e.g., whether an officer is aware that the suspect is armed or dangerous, or knows whether the alleged felony involved violence, its primary focus is on the attendant circumstances and the objective reasonableness of the officer's actions".

In cases which arise under a statute which takes a common-law approach to the use of deadly force, the courts have out of necessity, applied the *Garner* standard exclusively. For example, in *Davis v. Little* (851 F2d 605 [1988]), the Second Circuit Court of Appeals was confronted with a Connecticut statute which permitted the use of deadly force where the officer was attempting to apprehend "a person whom he reasonably believes has committed a felony" (851 F2d 605, 608, n 1), the very basis for the use of force found untenable in *Garner.* Under these circumstances, the court simply ignored state law, stating, "as *Garner* itself makes clear, the existence of a state statute does not fix the progress of constitutional law" (851 F2d 605, 610). However, where the state law reflects the standard enunciated in *Garner,* an altogether different situation is presented for, as

Garner also makes clear, state law is controlling unless, when examined under the Fourth Amendment "objective reasonableness" standard (*see, Graham v. Connor*, 490 US 386 [1989]), it is "constitutionally unreasonable" as applied to the facts of a given case (*Tennessee v. Garner, supra*, at 11-12). Unfortunately, the distinction is one which, thus far, seems to have escaped attention.

Penal Law §35.30 represents the law of this State with respect to the uses of deadly force by a police officer in the apprehension of a fleeing felon. Unless a determination is first made that the statute is unconstitutional, either on its face or as applied to the facts of a given case, there is no reason to depart from the standard of conduct which it espouses. The rule enunciated in *Tennessee v. Garner* is the relevant standard by which a statute is judged to accord a felon his rights under the Fourth Amendment. No decision has been brought to this court's attention, and none has been found, which has held Penal Law §35.30 to be unconstitutional as applied to facts similar to those at bar (*see, Estate of Jackson v. City of Rochester*, 705 F Supp 779 [WDNY 1989]; *see also, Merzon v. County of Suffolk*, 767 F Supp 432 [EDNY 1991]). To the contrary, the Second Circuit Court of Appeals has noted that Section 35.30 of the Penal Law "requires the jury to conduct precisely the same analysis as does the reasonableness standard of *Garner*" (*Heath v. Henning, supra*, at 9). The Circuit Court has further held that a violation of the statute does not necessarily constitute a violation of the Fourth Amendment because "not every instance of force proscribed by state law rises to the level of a constitutional violation so as to support a section 1983 [42 USC 1983] action" (*Finnegan v. Fountain*, 915 F2d 817, 821 [2d Cir 1990]).

The opinion in *Heath v. Henning* (*supra*), however, fails to appreciate the distinction between a case arising under

the common law and one involving a detailed statute utilizing the same criteria for the application of physical force approved in *Garner*. While stressing the similarity between the reasonableness standards in *Garner* and New York's law on justification (Penal Law §35.30), the Second Circuit Court of Appeals nevertheless criticized the District Court's instructions to the jurors on State justification as "ill-advised" and "unnecessary when considering section 1983 liability" (*Heath v. Henning*, 854 F2d at 9, *supra*). The result is that exactly the same analysis is applied as in *Davis v. Little* (*supra*), involving Connecticut's common-law statute: state law is ignored, and the analysis proceeds entirely on Fourth Amendment grounds. This approach is at variance with *Garner*, which requires the court to determine the constitutionality of state law as applied to the circumstances of a suspect's apprehension.

Implicit in the Second Circuit Court's approach is a finding that state law regarding the circumstances in which force may be employed is simply immaterial to a determination of liability arising out of the use of force by a police officer. Had the United States Supreme Court intended to supplant state law in favor of a test predicated entirely on Fourth Amendment grounds, it would undoubtedly have said as much. To the contrary, however, the *Garner* Court stated that where deadly force is used to prevent the flight of a suspect and the officer has "probable cause" to believe the crime involved the "infliction or threatened infliction of serious physical harm", even a statute based upon the common-law felony-misdemeanor distinction "would pass constitutional muster" (*Tennessee v. Garner*, 471 US at 11-12, *supra*). The clear intent of *Garner* is that, once a statute is found to accord a suspect the rights guaranteed under the Fourth Amendment, any liability for injury is to be determined as a matter of state law.

The practical difficulties inherent in the approach adopted by the Second Circuit Court of Appeals in *Heath v. Henning (supra)* become apparent when claims arising under both the Federal Constitution and State law are asserted. An action brought in New York pursuant to 42 USC §1983 is likely to include a pendent State claim which requires application of the criteria contained in Penal Law §35.30 in addition to the *Garner* Fourth Amendment standard, thus presenting an element of confusion about which the Second Circuit Court of Appeals expressed concern (*Heath v. Henning*, 854 F2d at 9, *supra*).

Merzon v. County of Suffolk (767 F Supp 432, *supra*) is a good illustration. There, as here, the plaintiff stated a claim under 42 USC §1983 together with claims under State law. The court first addressed the Fourth Amendment issue, applying the "objective reasonableness" standard derived from *Garner* in *Graham v. Connor* (*supra*), concluding that the plaintiff failed to establish a violation of rights guaranteed by the United States Constitution. The court then addressed the pendant State claim, ruling that the battery committed by the apprehending officer was justified under the criteria set forth in Penal Law §35.30. (The District Court did not, however, undertake any assessment of whether penal Law §35.30 is constitutional as applied to the facts before it.) The plaintiff's third cause of action based on negligent hiring and training was dismissed for lack of proof.

In presenting a case to a jury, there is always a potential for confusion when two different theories of recovery are asserted, each of which requires application of a different legal standard to the same set of facts. The potential is greatly compounded where, as in the matter under review, internal agency regulations are admitted into evidence, introducing yet another theory of recovery based upon a viola-

tion of those regulations. The legal significance of agency regulations can be radically different depending upon the particular cause of action pleaded. For example, operating regulations are obviously material to the adequacy of the training provided by defendant Transit Authority to its police officers. The operative question with respect to the Transit Authority regulations, therefore, is the use which was made of them at trial and not simply the propriety of their introduction into evidence.

Plaintiff McCummings asserts the same causes of action as did the plaintiff in *Merzon* (*supra*) and, as in that case, the cause of action founded upon negligent training and supervision was dismissed by the trial court, rendering unnecessary discussion of the significance and use of the regulations in this regard. Plaintiff's remaining claims state two separate and distinct causes of action to which different legal standards apply and with respect to which defendant's operating regulations must be accorded entirely different treatment. Plaintiff's Fourth Amendment claim questions the reasonableness of police actions and attacks the constitutionality of the State law under which the apprehending officer acted. If, as in *Garner,* the State statute is found to be unconstitutional as applied to the facts of the case, then it is for the trier of fact to determine if any policy or custom of defendant agency was responsible for the deprivation of the plaintiff's Fourth Amendment right to be free from unreasonable seizure (*Tennessee v. Garner,* 471 US at 23, *supra*). In this regard, agency regulations are germane to an assessment of the effort directed to secure compliance, by Transit Authority officers, with the constitutional requirement that the force employed in effecting an arrest be reasonable. To impose liability, plaintiff is required to demonstrate that agency standards are not, *at a minimum,* as restrictive as the

standards set forth in *Garner* so as to protect a suspect's Fourth Amendment rights.

By contrast, the claim based upon *respondeat superior* for an intentional tort committed by the Transit Authority's employee is governed entirely by State law concerning justification (Penal Law §35.30). Use of internal regulations in this context would unfairly place the agency in a paradoxical situation: to the extent that the agency sought to insulate itself from liability for Fourth Amendment violations by making its regulations even more stringent than the *Garner* standard, it would expose itself to greater liability in tort. Thus, as discussed below, agency regulations are not to be considered in connection with the issue of justification.

The potential for confusion in asking jurors to determine both legal and constitutional questions, governed by different legal standards requiring, in each instance, that agency regulations receive disparate treatment is obvious. The solution is, fortunately, equally obvious. The problem is obviated by a determination of the constitutional question as a threshold issue by the court, submitting to the jurors either the question of whether State justification criteria are met or, in the alternative, the question of whether the agency adopted a policy or custom which resulted in the deprivation of the suspect's rights (*Monell v. New York City Dept. of Social Servs.*, 426 US 658).

It would appear, moreover, that these two bases for recovery—Fourth Amendment and tort—are not only distinct, but also mutually exclusive. If an officer's actions are justifiable under a state law which is constitutional as applied to the facts of the case, then the only inquiry is whether the plaintiff has shown by a preponderance of the credible evidence that the circumstances did not justify the use of force pursuant to statute. If, however, the statute is not constitutional as applied to the facts of the case, then the

relevant inquiry is whether a policy or custom of the agency operated to deprive the plaintiff of rights secured by the Fourth Amendment.

The error committed in this case was the attempt to combine these two alternate grounds for liability, resulting in a hopelessly confusing charge affording the jurors no basis upon which to assess defendant's fault. As this court has stated, "where the error is so fundamental as to preclude consideration of the central issue upon which the claim of liability is founded, the court may, in the interests of justice, proceed to review the issue even in the absence of objection or request" (*Rivera v. Bronx-Lebanon Hosp. Center*, 70 AD2d 794, 796). Furthermore, while defense counsel may not have grasped the scope of the error or been able to articulate it with precision, his objections on the record are sufficient to preserve the issue for appellate review. The court's instructions are difficult to comprehend, and counsel may not be faulted for failing to perform, contemporaneously, an analysis of considerable complexity.

The threshold question to be addressed is whether the provisions of Penal Law §35.30 accord plaintiff the rights guaranteed him under the Fourth Amendment or whether the statute, as applied to the facts of this case, is unconstitutional. It bears emphasis that Penal Law §35.30(1) observes the criterion endorsed by the Supreme Court in *Garner* (*supra*), *viz.*, the danger which the suspect represents as suggested by either the immediate threat he poses to the officer or others or the violet nature of the crime for which his apprehension is sought. The statute provides: "1. A police officer or a peace officer, in the course of effecting or attempting to effect an arrest, or of preventing or attempting to prevent the escape from custody, of a person whom he reasonably believes to have committed an offense, may use physical force when and to the extent he reasonably believes

such to be necessary to effect the arrest, or to prevent the escape from custody, or to defend himself or a third person from what he reasonably believes to be the use or imminent use of physical force; except that he may use *deadly physical force* for such purposes only when he reasonably believes that: (a) The offense committed by such person was : (i) a felony or an attempt to commit a *felony involving the use or attempted use or threatened imminent use of physical force* against a person; or (ii) kidnapping, arson, escape in the first degree, burglary in the first degree, or any attempt to commit such a crime; or (b) The offense committed or attempted by such person was a felony and that, in the course of resisting arrest therefor or attempting to escape from custody, such person is armed with a firearm or deadly weapon; or (c) Regardless of the particular offense which is the subject of the arrest or attempted escape, the use of deadly physical force is necessary to defend the police officer or peace officer or another person from what the officer reasonably believes to be the use or imminent use of deadly physical force" (emphasis added).

In applying the justification statute, the courts of this State have gone so far as to note that "there can be no cavil with the proposition that a citizen may use reasonable force in self-defense where the force exerted by the police in effecting an arrest is excessive. Nor can there by any doubt that force used by the police may reach such dimensions as to be illegal" (*People v. Stevenson*, 31 NY2d 108, 112 [citations omitted]; *see, People v. Robinson*, ____AD2d ____, 572 NYS2d 159, *appeal denied* 78 NY2d 1014). "It has been held that even if a policeman is in the lawful course of his duties, the use of excessive force would be a legal basis for a finding of assault (*Jones v. State of New York*, 33 NY2d 275; *Hinton v. City of New York*, 13 AD2d 475)" (*Stein v. State of New York*, 53 AD2d 988).

The gravamen of plaintiff's action, however it may be expressed in his complaint, is the intentional tort of assault and battery. There is no doubt that a battery was committed. Officer Rodriguez admittedly fired two bullets into the back of Bernard McCummings, as the IAS Court repeatedly reminded the jurors during the course of delivering its instructions. The only issues to be decided are whether the shooting was justified pursuant to State law and whether the statute, as applied to the facts at bar, is consistent with plaintiff's Fourth Amendment right to be free from unreasonable seizure (*Tennessee v. Garner, supra*). If the shooting was justified under State law, there is no basis upon which to hold defendant liable for the battery committed by its employee, Rodriguez (*Merzon v. County of Suffolk*, 767 F Supp at 448-449 *supra*; *Jones v. State, supra*, at 279). And, if the statute under color of which Rodriguez acted is consistent with the Fourth Amendment, there is no basis upon which to hold defendant liable for the violation of plaintiff's right to be free from the unreasonable seizure which the assault and battery is alleged to represent.

Whether the shooting is justified under State law is clearly a question for the trier of fact (*Jones v. State of New York, supra*, at 280). Whether the statute determinant of the justification issue is constitutional is just as clearly a question for the court which must be decided before the jury can be instructed on the law. In considering this question, "[i]t must be assumed that the Legislature intended to enact a statute which was in harmony with the United States Constitution and the Constitution of the State of New York" (*People v. Epton*, 19 NY2d 496, 505, *cert denied and appeal dismissed* 390 US 29). Furthermore, as a matter of policy, the courts of this State must "construe statutes in such a manner as to uphold their constitutionality" (*People v. Kaiser*, 21 NY2d 86, 103, *affd sub nom Kaiser v. New York*, 394

US 280, *reh denied* 394 US 1025). Therefore, irrespective of the course adopted by the Second Circuit Court of Appeals in *Heath v. Henning* (854 F2d 6, *supra*), this court does not have the discretion to ignore State law in favor of a broad constitutional standard which, as it applies to the facts of this matter, remains to be defined by case law.

In deciding whether Penal Law §35.30 is constitutional as applied to the facts of this case, the court must determine whether or not the use of deadly force against a suspect in immediate flight from the commission of "a felony or an attempt to commit a felony involving the use or attempted use or threatened imminent use of physical force against a person" is reasonable in view of the Fourth Amendment considerations set forth in *Garner* (*supra*). As noted, the statute, insofar as it applies to the facts at bar, employs the criterion of dangerousness—as indicated by the violent nature of the felony committed or attempted—which was endorsed in *Garner* (*supra*) and the objective reasonableness standard which was applied in *Graham v. Connor* (490 US 386, *supra; Heath v. Henning, supra,* at 9). Therefore, the statute is philosophically consistent with controlling authority.

Of immediate concern in utilizing the statute as the basis for determining liability is whether, under the circumstances involved in this case, the statutory requirement that the felony involve the threat or use of "physical force against a person" is functionally equivalent to the requirement, stated in *Garner,* that the crime involve the potential "infliction of serious physical harm". While it is not readily apparent, a fair construction of Penal Law §35.30(1) (a) (i) is that, by employing the language "a felony involving * * * physical force" directed "against a person", the Legislature intended to designate a "violent felony offense". Every crime which is considered a violent felony is enumerated in Penal

Law §70.02(1). Nothing in *Garner* suggests that it is constitutionally unreasonable to regard someone who has committed one of the specified violent felony offenses as dangerous. Notably, one of the crimes listed is burglary involving the use of a weapon (Penal Law §140.30, burglary in the first degree), an offense which the United States Supreme Court specifically distinguished from the situation presented by the *Garner* case (471 US at 21, *supra*). However, as discussed earlier, the approach suggested by *Garner* is that each offense be evaluated *ad hoc*, under the circumstances of a particular suspect's apprehension (*Graham v. Connor*, 490 US at 396, *supra*).

In deciding *Garner*, the United States Supreme Court placed considerable emphasis upon the nature of the crime involved, as reflected in the classification of burglary by the F.B.I. as a "property" crime. In the instant matter, the statutory classification of robbery in the second degree as a violent felony offense (Penal Law §70.02[1][b]) is no less significant. The statute reflects the common law regarding robbery. As one court observed, "the rule followed in both England and the United States has been that the crime of robbery involves the taking of property by means of force or violence or by putting the victim in fear of suffering serious physical harm" (*Ryder v. City of Topeka*, 814, F2d 1412, 1419, n 17 [10th Cir 1987]). In *Ryder* (*supra*), which involved the shooting of an unarmed, 14-year-old girl by a police officer, the court determined that the shooting was justified based not on the type of crime, which the court found to be "non-violent" and "consensual" in nature, but on the fact that the officer reasonably believed the suspect to be armed and dangerous. The Tenth Circuit Court of Appeals noted that "theft lacks the threat of bodily harm or force that makes robbery such an inherently dangerous and violent crime" (814 F2d 1412, 1420). In the subsequent

case of *Ramos Ayala v. Diaz Martinez* (707 F Supp 75 [1988]), the United States District Court for the District of Puerto Rico dismissed a claim of the unjustified use of force by a police officer on the ground that the suspect was shot and killed while in immediate flight from the scene of a robbery which the court, citing *Ryder* (*supra*), characterized as "an inherently dangerous and violent crime" (707 F Supp 75, 77). The Court concluded, "Even if we draw the inference that decedent was unarmed, summary judgment would be appropriate" under *Garner* because of the violent nature of the crime (707 F Supp 75, 78).

Robbery is defined in Section 160.00 of the Penal Law as forcible stealing wherein the felon "uses or threatens the immediate use of physical force". It is recognized by the Legislature as a crime justifying the use of deadly physical force in the defense of a victim (Penal Law §35.15[2][b]). If, as the federal cases suggest, robbery is an inherently dangerous and violent crime, it is an offense which implicitly involved the threat of "serious physical harm", to use the terminology employed both in *Garner* (*supra*, at 11) and *Ryder* (*supra*, at 1419), justifying the use of deadly physical force to apprehend a robbery suspect. The courts of this State recognize robbery as a crime of innate violence and danger. "In considering what degree of physical force is sufficient to constitute a robbery, it should be borne in mind that the law of robbery, and indeed other forms of aggravated theft, developed 'to protect not only against misappropriation [of property] but also against injuries which may result from peculiarly dangerous means devised for accomplishing misappropriation' (Note, 54 Col L Rev 84). 'Regardless of the success of the misappropriation, aggravated theft is always accompanied by the possibility of physical or psychic injury to the victim' " (*People v. Santiago*, 62 AD2d 572, 579 [quoting, Note, 54 Col L Rev 184,

109], *affd* 48 NY2d 1023). Therefore, as applied to the apprehension of a robbery suspect by a police officer, Penal Law §35.30 is consistent with the Fourth Amendment criteria sent out in *Garner*.

If it may be said that the statute affords Fourth Amendment protection to robbery suspects in general, it certainly does not abrogate Fourth Amendment guarantees under the circumstances presented by the apprehension of Bernard McCummings. McCummings was in immediate flight from the commission of a violent felony to which Transit Officer Rodriquez responded. McCummings entered a negotiated plea of quilty to the attempt to commit the felony of robbery in the second degree. The victim was held in a choke hold and, according to his testimony, this was witnessed by the officer as he came upon the scene. The punching and choking of the victim constitutes the use of physical force as contemplated by the definition of second degree robbery (Penal Law §160.10[2][a]; *People v. Greene*, 70 NY2d 860, *rearg denied* 70 NY2d 951 [victim pushed to ground and held in choke hold]), a violent felony offense (Penal Law §70.02[1]), and by the definition of justification as it applies to the use of deadly physical force in making an arrest (Penal Law §35.30[1][a][i]). At the least, the force employed by the felons was sufficient, as a matter of law, to put the elderly victim in fear of sustaining "serious physical harm" (*Ryder v. City of Topeka, supra*, at 1419). In a statement given to police, Jacob Wise, one of plaintiff's accomplices, said, "I choked him and told him not to scream he started to scream and I choked him harder."

I am not aware of any case which has required an assessment of the constitutionality, pursuant to *Tennessee v. Garner* (*supra*), of a state law which justifies the use of deadly physical force against a fleeing felon based upon the violent nature of his crime (as opposed to the common-law distinc-

tion between felony and misdemeanor which *Garner* rejects). It is therefore understandable that the instructions given to the jury in this matter reflect a certain confusion regarding the applicable law. At the outset, the jurors were told, "Generally under the law it is held by the United States Supreme Court the use of deadly physical force by a police officer is unreasonable and unjustified if it is merely intended to prevent a felon from fleeing from a crime and who poses no immediate threat of serious physical injury or harm to an officer or others." This synopsis of *Garner* (*supra*) omits mention of the alternate ground justifying the use of deadly physical force provided by the violent nature of the crime involved. When the IAS Court did address this alternate ground of justification, the jurors were told that "a police officer may use deadly physical force to arrest or prevent the escape of a person from custody only when the officer reasonably believes that the person committed the felony or attempted to commit the felony involving the use or infliction or threatened eminent [*sic*] use or infliction of *serious* physical harm against another person. Provided the *level* of such deadly force used by the officer is reasonably believed by him to be necessary and not excessive to prevent an escape from custody and if where feasible some warning was [*sic*] given" (emphasis added). The court continued, "I might say serious physical injuries are defined under the Penal Law as an injury which creates a substantial risk of death or which causes death and protracted disfigurement or protractive [*sic*] impairment of health or protractive [*sic*] loss or impairment of a bodily organ or function." The latter instruction is the definition of "serious physical injury" found in Section 10.00(10) of the Penal Law. Defense counsel promptly registered his exception to the court's use of the statutory definition of "serious physical injury" (R 1673).

These instructions contain two substantive errors sufficient to require a new trial. First, the justification statute requires only that the felony committed involve the "use or attempted use or threatened imminent use of physical force against a person" (Penal Law §35.30[1][a][i]) and not "serious physical injury". While the United States Supreme Court provided no clarification of what was meant by "a crime involving the infliction or threatened infliction of serious physical harm" (*Tennessee v. Garner, supra*, at 11), it is patently unreasonable to assume that the Court had the New York definition of "serious physical injury" in mind when it employed the term "serious physical harm". A far more tenable construction is that the harm inflicted or threatened must be "substantial" (*Matter of Philip A.*, 49 NY2d 198, 200) and therefore within the statutory definition of "physical injury" (Penal Law §10.00[9]; *People v. McDowell*, 28 NY2d 373; *People v. Rodney*, 134 AD2d 463) and consistent with the common law concept of robbery as "the taking of property by means of force or violence or by putting the victim in fear of suffering serious physical harm" (*Ryder v. City of Topeka, supra*, at 1419; *People v. Greene, supra*). The choking and punching of the elderly victim was certainly sufficient force to put him in fear of sustaining serious physical harm, even though it resulted in no protracted impairment and may not have created any substantial risk of death.

The second substantive error in the instructions given to the jurors is the imposition of a requirement that the "level" of deadly force employed to capture McCummings had to be reasonably believed by the apprehending officer to be "necessary and not excessive". Both the Penal Law and *Tennessee v. Garner* (*supra*) speak only of deadly force and do not attempt to distinguish *levels* of deadly force. The jurors were therefore left to speculate as to what "level" of deadly

force might be reasonable under the circumstances and what might be excessive. However, the giving of a warning to the suspect, when feasible, is material to a consideration of whether the apprehending officer reasonably believed the use of deadly force to be necessary, and there is no inconsistency in *Garner* and State law in this regard.

The jurors were clearly confused by the court's charge regarding justification because reinstruction was requested, at which time defense counsel renewed his objection to the charge (R 1918). The court, however, simply directed the court reporter to read back its previous instructions on the subject.

During the pre-charge conference, the court indicated to counsel that it considered Penal Law §35.30 and *Garner* (*supra*) to be in harmony stating, "I still believe that *Garner* is consistent with the statute," (R 1712) and, "As to *Garner* and 35.30 [they] are the same and they a[r]e consistent" (R 1714). Yet, the court departed from the language of the statute and engrafted onto it the requirement that the subject felony involve "serious physical injury", as defined in Penal Law §10.00(10). Thus, "necessarily implied in the decision" is a finding, *sub silentio*, that the statute as written fails to accord plaintiff the Fourth Amendment rights delineated in *Garner* (*supra*), a finding which constitutes an independent basis for this court's appellate review (CPLR 5701[a][2][vii]).

That the victim in this case did not sustain serious physical injury is not dispositive, contrary to the instructions given to the juror, but merely fortuitous. (The victim was treated for abrasions to the face and head.) Violence is a slippery path, and the criminal who embarks upon it cannot be sure how far down it he may slide. The harm which is actually inflicted during a robbery attempt may be tragically different from that which was intended by the assailant

(*People v. Santiago, supra,* 62 AD2d 572, *affd* 48 NY2d 1023 [purse snatching victim crushed to death by subway car]; *People v. Sanders,* ____AD2d____, 570 NYS2d 23, *appeal denied* 78 NY2d 1014 [victim, pushed to ground during attempted robbery striking head on pavement, dies from injury]) or from the consequences which might logically be expected to result from the intended nature of criminal conduct directed against an elderly or infirm victim (*People v. Ingram,* 67 NY2d 897 [victim of apparent burglary attempt suffers myocardial infarction and expires]). The extent of the injury which might have been inflicted had Transit Officers Rodriguez and Mead not been present to intervene cannot be surmised. It is perhaps because of an appreciation of the practical difficulty in containing the extent of injury which follows from the felon's resort to force which led the Legislature to authorize the use of deadly force against a suspect for the use of "physical force" (Penal Law §35.30[1][a][i])—as opposed to the infliction of some specified severity of injury (*see,* Penal Law §10.00[9];[10])—during the commission of a felony.

The jury was also erroneously instructed to consider defendant Transit Authority's regulations governing the use of deadly force. In objecting to the court's proposal to permit consideration of these regulations by the jurors during deliberation (R 1687-1693), defense counsel pointed out, quite correctly, that "the justifiableness of a shooting can only be judged by legal standards" (R 1689). This action must be distinguished from cases in which an officer commits an act of recklessness resulting in injury to a bystander during the course of an otherwise justified shooting, for which the officer remains liable by express statutory provision (Penal Law §35.30[2]; *See, e.g., Shaw v. Manufacturers Hanover Trust Co.,* 95 AD2d 738). It must be emphasized that this is not a negligence case where the parties are free to

stipulate as to the standard of conduct which is appropriate under the circumstances. This matter involves an intentional tort which is either justified or not justified under State law, and defense counsel so advised the court (R 1689-1690). The standard with respect to justification which applies to this case is set forth in Penal Law §35.30 (*Merzon v. County of Suffolk*, 767 F Supp at 448-449, *supra; Cook v. City of New York*, 82 AD2d 72, 75-76), and any question regarding the interpretation of that statute is a question of law for the court.

Mere administrative regulations may not be placed on an equal footing with a statute so as to compromise the intent of the Legislature in enacting it (*Georgiou v. State of New York*, 28 AD2d 1027, *lv den* 21 NY2d 641). As this court recently stated in *Clark v. New York City Transit Auth.*(____AD2d____, 1992 NY App Div Lexis 874), "internal rules * * * are not admissible when they impose a standard higher than that otherwise set by law" (citing *Rivera v. New York City Transit Auth.*, 27 NY2d 322, 329; *Crosland v. New York City Transit Auth.*, 68 NY2d 165, 168-169). While defendant's regulations were properly admitted into evidence in connection with plaintiff's action for negligent training and supervision, they ceased to have any relevance to this case as soon as the negligence cause of action was dismissed. Defense counsel advanced precisely this argument upon renewing his objection to the use of defendant's regulations by the jurors during deliberations (R 1908-1910). (As noted above, if Supreme Court's *sub silentio* ruling that Penal Law §35.30 is unconstitutional as applied to the facts of this case were proper, the regulations would then be relevant to the jurors' consideration of whether any policy or custom adopted by the Transit Authority Police Department resulted in the deprivation of plaintiff's constitutional rights, as required for liability in

Monell v. New York City Dept. of Social Servs. [436 US 658, *supra*].)

In light of the numerous objections raised by defense counsel to proposed instructions and his timely exception to numerous elements of the charge delivered by the court, as well as the court's implicit ruling that Penal Law §35.30 is not constitutional as applied to the facts of this case by virtue of its failure to mention "serious physical harm" (however that term should be construed), there can be no doubt that the issue raised upon this appeal has been preserved for review. Having asserted in timely fashion, during the pre-charge conference and again upon the jurors' request for reinstruction on the law of justification, that this issue is governed by Penal Law §35.30, defense counsel put the court on notice as to the existence of a controlling statute asserted to be dispositive of the issue presented (*see, Arbegast v. Board of Educ. of S. New Berlin Cent. School*, 65 NY2d 161, 163 n 1). Defendant has done all that is required to preserve for review the question of whether the statute is the standard by which the reasonableness and lawfulness of Transit Officer Rodriguez's shooting of plaintiff McCummings is to be determined. Defense counsel was not required to advance any argument in favor of the statute's constitutionality: a presumption to that effect operates in his favor, and the burden falls upon plaintiff's counsel to rebut the presumption (McKinney's Statutes §150[b]).

The United States Supreme Court's opinion in *Tennessee v. Garner* (*supra*), requires the courts of this nation to take a reasonable approach regarding the seizure of felony suspects based upon the danger which they represent (reflected, in this instance, by the violence of the pertinent crime). The opinion makes clear that police officers—and the courts—must distinguish between suspects who, by their acts, constitute no danger and those who have demonstrated a capac-

ity for violent assaultive behavior. "Determining whether the force used to effect a particular seizure is 'reasonable' under the Fourth Amendment requires a careful balancing of ' "the nature and quality of the intrusion on the individual's Fourth Amendment interests" ' against the countervailing governmental interests at stake" (*Graham v. Connor,* 490 US 386, 396). A balancing of the State's interest in effective law enforcement, including the apprehension of suspects, and the felon's interest in being free from unreasonable seizure does not require that officers refrain from employing their weapons to prevent escape in every instance (*see, Tennessee v. Garner,* 471 US at 11, *supra*).

Accordingly, the judgment of the Supreme Court, New York County (Leonard Cohen, J.), entered March 8, 1990, upon a jury verdict in favor of plaintiff in the amount of $4,343,721.24, and the order of the same court, entered May 14, 1990, denying defendant's motion to set aside the jury verdict, should be reversed, on the law, without costs, and the matter remanded to Supreme Court for a new trial on the question of whether the shooting of plaintiff was justified pursuant to Penal Law §35.30.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

ENTERED: February 20, 1992

CATHERINE O'HAGAN WOLFE
Deputy Clerk

APPENDIX C—Order of New York State Court of Appeals (April 5, 199[illegible]

Remittitur

COURT OF APPEALS

STATE OF NEW YORK

The Hon. Judith S. Kaye, Chief Judge, Presiding

1 No. 32

BERNARD MCCUMMINGS,

Respondent,

v.

NEW YORK CITY TRANSIT AUTHORITY,

Appellant.

The appellant in the above entitled appeal appeared by Albert C. Cosenza, Esq., Counsel, New York City Transit Authority; the respondent appeared by David Breitbart, Esq.

The Court, after due deliberation, orders and adjudges that the order, insofar as it affirmed the judgment of Supreme Court, is affirmed, with costs, in a memorandum.

Appeal, insofar as taken from that portion of the Appellate Division order which affirmed the order of Supreme Court denying defendant's post-judgment motion to vacate and set aside the verdict and judgment, is dismissed upon the ground that that portion of the order does not finally determine the action within the meaning of the Constitution. Chief Judge Kaye and Judges Simons, Hancock and Smith concur. Judge Titone dissents in part and votes to dismiss the appeal in part and reverse in part in an opinion. Judge Bellacosa separately dissents in part and votes to dismiss the appeal in part and reverse in part in an opinion.

The Court further orders that this record of the proceedings in this Court be remitted to the Supreme Court, New York County, there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

DONALD M. SHERAW
Clerk of the Court

Court of Appeals, Clerk's Office, Albany, April 5, 1993.

APPENDIX D—Order of Denial of New York State Court of Appeals (July 8, 1993).

COURT OF APPEALS,

STATE OF NEW YORK.

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the eighth day of July 1993

Present, HON. JUDITH S. KAYE, Chief Judge, presiding.

Mo. No. 541

BERNARD MCCUMMINGS,

Respondent,

v.

NEW YORK CITY TRANSIT AUTHORITY,

Appellant.

A motion for reargument to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been submitted thereon and due deliberation thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

DONALD M. SHERAW
Clerk of the Court

APPENDIX E—Judgment of the New York State Supreme Court, County of New York (March 8, 1990).

SUPREME COURT OF THE STATE OF NEW YORK,

COUNTY OF NEW YORK.

TRIAL TERM PART 23
JUSTICE COHEN

BERNARD MCCUMMINGS,

Plaintiff,

against

NEW YORK CITY TRANSIT AUTHORITY,

Defendant.

Index No. 9494/85

This matter having been tried with a jury before the Hon. Leonard N. Cohen on and between January 23, 1990 and March 6, 1990, and the Court and Jury having heard testimony and received evidence, and due deliberation having been had thereon, and the Jury having found in favor of the plaintiff on March 6, 1990.

NOW, upon motion of David Breitbart, 60 Hudson Street, New York, N.Y., attorney for plaintiff, Bernard McCummings, it is hereby

ADJUDGED, that plaintiff Bernard McCummings, who resides at West 126th Street, New York, N.Y., shall recover against defendant New York City Transit Authority, whose place of business is 370 Jay Street, Brooklyn, New York, the sum of $4,342,142.55 with interest from March 6, 1990, in the sum of $723.69 together with costs and disbursements in the sum of $855.00, making a total of $4,343,721.24 and that said plaintiff shall have execution thereof.

Dated: New York, N. Y.
March 8, 1990.

NORMAN GOODMAN
Clerk

FILED

MAR 8 1990

COUNTY CLERK'S OFFICE
NEW YORK

APPENDIX F—Excerpts From Plaintiff's Trial Memorandum.

(2073) SUPREME COURT OF THE STATE OF NEW YORK,

COUNTY OF NEW YORK.

BERNARD MCCUMMINGS,

Plaintiff,

against

NEW YORK CITY TRANSIT AUTHORITY,

Defendant.

Index No. 9494/85
Calendar No. 87L02533

PLAINTIFF'S TRIAL MEMORANDUM

STATEMENT OF THE CASE

This is an action to recover money damages arising from personal injuries sustained by the plaintiff, Bernard McCummings, as a result of having been shot twice in the back by a police officer employed by the New York City Transit Authority upon fleeing from the scene of a robbery on June 28, 1984. The shooting took place at approximately 8:00

P.M. at the 96th Street IND Subway Station at the Northeast side of the southbound platform stairs. The defendant Bernard McCummings, acting in concert with two others, Jacob Wise and Nathan Woods, were in the act of robbing a person who had entered the 96th Street Subway Station at 97th Street and was descending the subway stairs on his way to the southbound platform at said subway station. Police Officer Manuel Rodriguez and his partner, Christine Meade, came upon the scene of the robbery Officer Rodriguez claiming that the perpetrators "lunged" at him, fired five shots at McCummings and Wise, both of whom were in fact fleeing in an (2074) effort to avoid arrest. One of the bullets struck McCummings in the center region at the spine in the mid chest/back area causing immediate paralysis. It is the plaintiff's claim that the shooting was totally without justification and in violation of his Fourth Amendment rights under the United States Constitution.

(2075) FACTS OF THE CASE

On July 28, 1984 at approximately 8:00 P.M. the plaintiff Bernard McCummings, together with two of his companions, Jacob Wise and Nathan Woods, acted together in the commission of a robbery. The robbery took place at the 96th Street IND Subway Station at the AA Line at the Northeast side of the southbound stairwell leading to the southbound subway platform. The robbery victim, identified by the Transit Authority Police as Jerome Sandusky, was entering the 96th Street IND Subway Station at 97th Street and Central Park West.

After entering through the turnstiles, Sandusky proceeded down the subway stairs passing as Nathan Woods, who was acting as a lookout for McCummings and Wise. Upon reaching the landing, Sandusky was accosted by McCummings

and Wise. Wise began to choke Sandusky while McCummings went through his pockets.

According to the Transit Authority, Police Officer Manuel Rodriguez, Shield # 757465 and his partner, Police Officer Christine Meade Shield # 2871, came down the stairs and, at the bottom of the landing, observed a robbery in progress. Officer Rodriguez, followed by Officer Meade, having heard screams coming from the bottom of the steps, proceeded down this flight of stairs with weapons drawn. Upon observing the robbery, Officer Rodriguez allegedly displayed his shield which he keeps on a chain around his neck, identified himself as a police officer and (2076) stated, ". . . in a loud and clear voice 'Police don't move'." Officer Rodriguez further claims that after shouting "Police don't move", the perpetrators "lunged" at him at which time he shot five shots in their direction. One bullet struck Wise in the right hand. Two bullets struck McCummings in the back. There is an entry wound below the left shoulder blade and another entry wound in the center region at the spine in the mid chest/back area. Rodriguez further alleges that after shooting McCummings, he attempted to flee the scene, ran down the stairwell towards the subway platform and collapsed at the bottom of the stairs. The distance between the location at the landing where Rodriguez claims that McCummings and Wise "lunged" at him and the location at the bottom of the stairs where McCummings collapsed, is approximately fifteen feet. It is thus the Transit Authority's contention that McCummings, having been shot in the spine, managed to run a distance of fifteen feet before collapsing.

Captain John Kelly of the Transit Authority Police Department investigated the facts and circumstances surrounding the robbery and shooting. In a report dated June 28, 1984, Captain Kelly issued his report to the Chief of the

Transit Police. His report fully supports the contention by Rodriguez that he shot McCummings while he and Woods lunged at him. The report states "Both culprits somewhat simultaneous(ly) lunged at the officer at which time he fired five rounds." The Kelly (2077) report also states that Officer Meade claims that at the time of the shooting, she was standing behind Rodriguez and was unable to view the robbery scene. Therefore she cannot support the contention of Rodriguez that the perpetrators "lunged" in his direction before he shot at them.

In a followup report prepared by Captain Kelly dated July 1, 1984, Kelly speculates as to how it is possible that McCummings could have lunged at Rodriguez and have sustained two bullet wounds to his back. The report states: "With regard the culprit being hit on the spine, it is only opinion at best, since no one including the officer could clarify. The culprit sustained a bullet graze to his lower right side which may have spun him around, causing another round to (hit) his spine. There is no independent witness as it is an isolated landing." Obviously, Captain Kelly is troubled by the evidence in this case. The back injuries to McCummings are simply not consistent with the Rodriguez version of the shooting.

McCUMMINGS' VERSION OF THE SHOOTING

Bernard McCummings admits that he, acting in concert with Jacob Wise and Nathan Woods were caught in the act of robbing Jerome Sandusky as described by the Transit Authority Police Department. He further admits that on October 29, 1984, he pled guilty to the crime of attempted robbery in the second degree in that he, while acting in concert with two others, (Wise and Woods) robbed Jerome Sandusky at 8:00 P.M. on June 28, 1984. (2078) No

weapons were used by any of the perpetrators in the commission of the robbery. Nor do the police claim that a weapon was used by any perpetrator. Physical, medical and eye witness evidence support the contention that when the police came upon the scene, McCummings and Wise attempted to flee from them by running down the stairs. McCummings denies lunging at Rodriguez. When the bullet struck his spine, McCummings collapsed immediately. Richard Radna, M.D. in a report dated November 7, 1989, concludes that it is his impression that, within a reasonable degree of medical certainty, McCummings was rendered weak in the bilateral lower extremities immediately following the gunshot wound to his spine which precluded him from standing, walking, or running. That being the case, how could McCummings have run a distance of about fifteen feet before collapsing? Fifteen feet being the approximate distance from the location where Rodriguez claims to have fired and where McCummings collapsed. Thus it is apparent that the shooting took place while McCummings attempted to flee the scene of the robbery and not while "lunging" at Rodriguez.

The McCummings claim that he was shot in the back while attempting to flee from the scene of the robbery is further supported by Jerome Sandusky, the robbery victim. In a letter dated July 9, 1984, addressed to the Chief of the Transit Police, Sandusky states "In the middle of this situation (the robbery) he (Rodriguez) intervened by saving me and shooting two of the men *as they attempted to escape from him.*" (emphasis added).

(2079) THE APPLICABLE LAW

The plaintiff in this action complains that the Transit Police Department, through its agent, Police Officer Manuel Rodriguez, violated his Fourth Amendment rights in using deadly physical force to apprehend him while fleeing from the commission of a felony. As previously stated, the plaintiff admits that he was in the act of committing a robbery when Officers Rodriguez and Meade came upon the scene. However, neither the plaintiff nor his accomplice were armed during the commission of the crime, nor during their attempt to flee, nor did they pose a significant threat of harm to this police or a third party. Thus, Officer Rodriguez used deadly force under circumstances where such force is not permissible.

The controlling case in situations involving the use of deadly force to apprehend unarmed fleeing felons is *Tennessee v. Garner,* 471 U.S. 1, 105 S.Ct. 1694 (1985). In *Garner,* those provisions of the Tennessee statute declared unconstitutional by the United States Supreme Court, authorized the use of deadly force against an unarmed, nondangerous fleeing suspect in order to prevent his escape. The Court, in striking down portions of the Tennessee statute, determined that apprehension by use of deadly force is a seizure subject to the Fourth Amendment's reasonableness requirement.

The facts in *Garner* are that on October 3, 1974, a police officer of the Memphis Police Department shot a fleeing burglary suspect. The police, coming upon the scene of a burglary, and (2080) observing the suspect shouted, "Police, halt." In an effort to escape apprehension, Garner began to climb over a fence. Convinced that if Garner managed to get passed the fence, that he would elude capture, the Officer shot him. The bullet struck Garner in the back of the head killing him. The action was brought by the

victim's father, seeking damages under 42 U.S.C. Sec. 1983 for violation of Garner's constitutional rights. The Court held that:

1) apprehension by use of deadly force is a seizure subject to the Fourth Amendment's reasonableness requirement; and

2) deadly force may not be used unless it is necessary to prevent the escape *and* the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others; and

3) the Tennessee statute which permits a police officer to fire upon a fleeing suspect is unconstitutional insofar as it authorizes the use of deadly force against apparently unarmed, nondangerous fleeing suspects.

The issue of retroactivity of *Garner* was determined by the Second Circuit Court of Appeals in *Davis v. Little*, 851 F.2d 605 (2d Cir. 1988). In *Davis*, a police officer employed by the Waterbury Connecticut Police Department, shot Robert Davis, causing serious physical injury. At the time that Davis was shot, the Officer knew that Davis was an escaped felon who was in (2081) flight from the custody of a fellow police officer; that Davis was unarmed, and that Davis had made no threat to use deadly force against any police officer or third party. Thus, deadly force was used for the sole purpose of thwarting the escape of a fleeing felon.

Under the facts as indicating above, the Court ruled that deadly force violated Davis' Fourth Amendment rights. The defendant contended that the Court erred in applying the *Garner* rule to police activity which occurred years before the decision was rendered. Particularly in light of a Con-

necticut statute in force at the time of the shooting which appeared to permit the use of deadly force to justify the shooting under the facts of *Davis*. In rejecting this argument, the Court determined that *Garner* was not an entirely new and unanticipated principle of law and consequently, should be applied retroactively to events which predate *Gardner*. The Court further stated that almost every other Circuit which considered the retroactivity of *Garner* applied its holding retroactively.

In *Heath v. Henning*, 854 F.2d 6 (2d Cir. 1988), the Court applied the *Garner* Fourth Amendment analysis retroactively in a case involving the apprehension of a fleeing robbery suspect who was shot by police. The police admitted that at the time of the shooting they saw no weapons in the plaintiff's hands. The *Heath* Court opined (at page 9):

> (2082) "The consideration of such subjective factors (proof that the officers acted with malice) is inconsistent with the Fourth Amendment balancing test articulated in *Garner*. The proper standard requires that a jury consider whether the officers acted reasonably, under the totality of the circumstances, in using deadly force to effect the arrest . . . While the Fourth Amendment test does take into account the officer's knowledge, e.g., whether an officer is aware that the suspect is armed or dangerous, or knows whether the alleged felony involved violence, its primary focus is on the attendant circumstances and the objective reasonableness of the officer's actions."

APPENDIX G—Excerpts From Plaintiff's Request to Charge.

(2085) SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

BERNARD MCCUMMINGS,

Plaintiff,

against

NEW YORK CITY TRANSIT AUTHORITY,

Defendant.

Index No. 9494/85

Plaintiff Bernard McCummings requests that the following jury charges be given by the Court to the Jury on this matter:

1. PJI 1:22.

2. Apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment of the United States Constitution. *Tennessee v. Garner,* 105 S.Ct. 1694 (1985) (at p. 1699) 471 U.S. 1, *Davis v. Little,* 854 F. 2d 605 (2d Cir. 1988), *Heath v. Henning,* 854 F. 2d 6 (2nd Cir. 1988).

3. Reasonableness is to be determined by balancing the infringement of the individual's interest caused by the police action against the Governmental interest served by that action. *Martin v. Malhoyt*, 830 F.2d 237, 261 (D.C. Cir. 1987), *United States v. Place*, 462 U.S. 696, 703, 103 S.Ct. 2637, 2642 (1983).

4. The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from (2086) failing to apprehend him does not justify the use of deadly force to do so. It is no doubt unfortunate when a suspect who is in sight escapes, but the fact that the police arrive a little late or are a little slower afoot does not always justify killing the suspect. The New York Statute, Penal Law Section 35.30, is unconstitutional insofar as it may be interpreted to authorize the use of deadly force against such fleeing suspects.

It is not, however, unconstitutional on its face. Where the officer has probable cause to believe that the suspect poses a threat of serious physical injury, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical injury, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given. As applied in such circumstances, the New York Statute would pass constitutional muster. *Tennessee v. Garner, supra,* (at p.1701), *Davis v. Little, supra, Heath v. Henning, supra.*

5. "Serious physical injury" is defined by Section 10.00 of the Penal Law as "10. 'Serious physical injury' means injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, pro-

tracted impairment of health or protracted loss or impairment of the function of any bodily organ."

(2087) 6. If you find that Police Officer Rodriguez shot Bernard McCummings as he and Wise lunged at Officer Rodriguez thereby putting him in imminent fear of death or serious physical injury then you must find in favor of the defendant, The New York City Transit Authority. If on the other hand, if you find that Police Officer Rodriguez fired his weapon at Bernard McCummings while he was fleeing after having committed a robbery and that one of the bullets struck him in the spine at the bottom of the steps (PL 6) and that he was unarmed and posed no significant threat of death or serious physical injury to either Police Officers Rodriguez, or Meade or to a third person, then you must find in favor of the plaintiff.

7. If you find that the defendant's claim that it shot the plaintiff, Bernard McCummings because he and Wise lunged at P.O. Rodriguez, thereby putting him in imminent fear of death or serious physical injury is not supported by the evidence in this case, but rather was a cover-up story designed to justify an improper shooting, you may find that such false claim was offered as a result of consciousness of guilt on the part of the defendant, NYCTA, and you may infer that this was a shooting outside the standards of propriety. *People v. Haitz*, 411 N.Y.S.2d 57 (4th Dept. 1978), *People v. Griffin*, 511 N.Y.S.2d 136 (2d Dept. 1987).

* * *

APPENDIX H—Colloquy During Trial.

(700) MR. KUZMACK: In *Garner,* which plaintiff alleges is controlling, and I agree with him to the extent that the case law is controlling in this instance, in *Garner* the Court says:

"Thus if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime (701) involving the infliction or threatened infliction of serious physical harm, deadly force may be used, if necessary, to prevent escape and if where feasible some warning has been given."

I would submit that under the Penal Law or under *Tennessee versus Garner,* your Honor, whether the Court or the jury believes the plaintiff's story or the officer's version, it's immaterial, and that at the end of the case we will ask for a directed verdict on this and I will make a proper motion at that time.

* * *

(702) MR. SIERADZKI: Number two, we believe that counsel has (703) misinterpreted *Tennessee against Garner. Tennessee against Garner* which is a 1985 U.S. Supreme Court decision struck down that portion of a *Tennessee* statute which permitted police officers to use deadly physical force in the apprehension of unarmed fleeing felons. Our argument, that is exactly what we have here, an unarmed fleeing felon. And in striking down that statute the Supreme Court held, number one, that the apprehension by use of deadly physical force is subject to the Fourth Amendment reasonableness requirement.

Number two, that deadly physical force may not be used unless it is necessary to prevent the escape, and the officer

has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.

Under the plaintiff's contention of the facts of this case—

THE COURT: How do you reconcile that with 35.30 as Mr. Kuzmack just stated?

MR. SIERADZKI: 35.30 is not applicable. We are going to argue that *Tennessee* (704) *versus Garner,* which has retroactive effect, is applicable and under the *Tennessee versus Garner* standard you may not use deadly physical force to apprehend an unarmed fleeing felon, that is what the U.S. Supreme Court said.

And it was further interpreted in two Second Circuit Court of Appeals decisions right here in the Second Circuit. One is *Health against Henning,* 854 F 2d at page 6, which as I indicated is a Second Circuit decision 1988. *Heath against Henning* ruled that the *Tennessee against Garner* decision is retroactive, has retroactive effect.

* * *

(706) MR. BREITBART: The Supreme Court of the United States in that case ruled that any statute that permits anyone to shoot a fleeing felon that is unarmed is unconstitutional and not enforced in this country.

THE COURT: 35.30 would be unconstitutional to that extent.

APPENDIX I—Excerpts From Charge Conference.

(1661) MR. KUZMACK: For the record, I would renew my motion for a directed verdict at the end of the defendant's case and ask the Court to look at the memo I submitted at the end of the plaintiff's case, keeping in mind that the standard at this point changes and that all the evidence does not have to be taken in light most favorable to the plaintiff, which, I submit, just in short, whether the Court believes that the plaintiff was shot while lunging at the officer and that the officer was reasonable to believe he was in fear of his life or that deadly physical force was being used against him, or whether he was shot escaping; that, under the laws as it stands (1662) on the 3530 and under *Tennessee v. Garner,* that because it was a violent felony that was committed either way.

THE COURT: I realize that has been your contention. The reading of *Garner,* certainly of the paragraph on page 1701, that your position is even if he was shot in the back while fleeing down the stairway, that, therefore, your position is that even under *Garner,* it was a justifiable shooting.

MR. KUZMACK: I would renew the motion at this time.

THE COURT: If that were the case, there would be no trial. I think that position was asserted after plaintiff's prima facie case.

MR. KUZMACK: Yes, it was, your Honor.

THE COURT: I will deny your motion. I do not believe that is the law. That is my opinion. I may be wrong on it, but I don't believe that is precisely what the law is as applied to the facts in this case, and I will deny the motion.

* * *

(1667) I will charge that the Supreme Court has held that the use of deadly force, generally, against a felon who is fleeing from a crime is—I think the *Garner* decision states that it is unreasonable under the law—then I will go on to state what (1668) the law is in the *Garner* decision, which governs this case, as does Penal Law 3530—that if a suspect or any person who commits any offense threatened the officer with the weapon or deadly weapon or any—or otherwise with imminent physical force, serious physical force, that the use of deadly force is justified—or that if the use of deadly force is justified, if the police officer reasonably believes that a felon has committed a crime involving the infliction or threatened infliction of serious physical harm, and that the officer reasonably believes that such level of deadly force is necessary to prevent an escape from custody, and where feasible, a warning is given—that, generally, is what I would be charging and would be charging also because that's expressed in 3530—I think the same thing is expressed in 3530.

* * *

(1679) THE COURT: I would be reading the guidelines probably before. I will be reading the guidelines, and I'll be reading 3530 as well as *Garner* before then.

* * *

(1680) THE COURT: I will charge them as to *Garner* and P.L. 3530.

MR. BREITBART: And then the guidelines?

THE COURT: As well as *Garner*—and I've read it already, on the record. I don't want to repeat it—except, I will state that one of the justifications for the use of deadly force under 3530—I have to repeat it—is if the offense is (1681) a felony or an attempt to commit a felony involving the use or

attempted use or threatened imminent use of physical force against a person, deadly force is justified.

I have added the scenario that assuming they disbelieve Rodriguez and they believe the plaintiff, that he ended up at the bottom of the stairs and was shot in the back, that in that event, that the officer also has to have a reasonable belief that such level of force was necessary.

* * *

(1687) THE COURT: Well, I will be charging the use of deadly force. I will be charging it with respect to 3530, because it pinpoints it, right on the button.

I will be charging *Garner*, which pinpoints it right on the button—and also the guidelines.

* * *

(1712) THE COURT: No, I am going to read in substance the combination of the Supreme Court decision and the statute because I think they basically are the same.

MR. BREITBART: Well they are not for this reason and this is the problem that we went over last night and this morning. As you are very well aware the decision in *Garner* condemning the shooting of a burglar making unconstitutional a statute that permitted such shooting, nothing has been done with the New York statute since *Garner* or since 1984. The New York statute does include burglary as a justifiable shooting even though *Garner* precludes it under the law.

I would ask you to look at 3530 subdivision—

THE COURT: Well assuming that is true, I still believe that *Garner* is consistent with the statute.

MR. BREITBART: with 3530?

THE COURT: Yes. With respect to the use of the—again with respect to two things. One, the use of deadly force where an officer (1713) reasonably believes that he is being faced with a serious physical harm or danger or threat to his life to defend himself. With respect to any offense whether it was a felony or any offense in that event he has the right, it is justifiably to use deadly force either under *Garner* or under the statute.

MR. BREITBART: No argument.

THE COURT: The only other instance in terms of the facts in this case is that is whether a police officer can use deadly force when he—if he reasonably believes that a violent felony or forcible felony has been committed or is threatened to be committed and it is—and he—and it is reasonable for him to believe that it is necessary to use that level of deadly force based upon the circumstances confronting the police officer at the time of the incident both under *Garner* and under 3530, it is the same.

It can be justified. Or if it is unreasonable for the officer to believe that a crime, whether it is a violent felony crime has been committed or is threatened to be committed (1714) or even if you believed that or even if they should find that the police officer should reasonably or should have reasonably believed or did reasonably believe that a violent felony had been committed or was threatened to be committed then the issue is whether or not a police officer reasonably believed that the level of force such as deadly force was necessary and a warning if feasible was given. Based upon the circumstances confronting the officer.

MR. BREITBART: That we understand.

THE COURT: As to *Garner* and 3530 are the same and they are consistent.

MR. BREITBART: They are not consistent, Judge—

THE COURT: I will charge that way.

* * *

(1716) MR. BREITBART: Are you going to describe the guidelines as a standard of care and the violation of the guidelines is negligence?

THE COURT: No.

MR. BREITBART: That is the law.

THE COURT: I will not so charge. I am not charging negligence in this case. I am charging basically whether or not the use of deadly force, deadly physical force was justified or unjustified and the plaintiff has the burden of proof of establishing the lack of justification.

* * *

APPENDIX J—Excerpts From Charge to Jury.

(1889) As I stated before there is no dispute that the plaintiff committed the felony crime of robbery on June 28, 1984 which involved the use of serious physical harm and force against Jerome Sandusky. It is also undisputed that neither the plaintiff or other criminal defendants were unarmed with a gun or even appeared to have such weapons and in addition to that Police Officer Rodriguez acted within the scope of his official duties as an officer of the Transit Authority in using deadly force and as I say the use of the force was a proximate cause of the personal injuries to the plaintiff. There is no dispute about that.

What is in dispute is whether Police Officer Rodriguez in using deadly force against the plaintiff acted unjustifiably as plaintiff claims or justifiably as defendant contends (1890) on June 28, 1984.

Now your verdict as to this issue depends upon the law as it applies to the use of deadly physical force by a police officer. Under the totality of the circumstances of which you find confronted the officer immediately before at the time of his firing of the revolver. Generally under the law it is held by the United States Supreme Court the use of deadly physical force by a police officer is unreasonable and unjustified if it is merely intended to prevent a felon from fleeing from a crime and who poses no immediate threat of serious physical injury or harm to an officer or others.

However, in this case under the law as held by the United States Supreme Court decision and under the New York State Penal Law, Section 35.30 a police officer may use deadly force to prevent the escape of any criminal offender or suspect if the police officer reasonably believes that a person committed or attempted to commit any type of criminal offense felony or otherwise but the suspect is armed

with a firearm or a deadly weapon or it is necessary (1891) for the police officer to defend itself or herself or another person from what the police officer reasonably believes to be the use or imminent use of deadly physical force or from the threat of serious physical harm against him or her as a police officer or another person. Such use of deadly force by a police officer under those circumstances would be justified under the law.

Therefore if you believe the defendants evidence and the testimony of Police Officer Rodriguez that he reasonably believed that the plaintiff committed or attempted to commit a felony of forcible robbery and that the plaintiff and another felony offender, Wise, lunged at him on the landing between PL5 and PL6 and the Police Officer Rodriguez reasonably believed that the plaintiff posed a threat of imminent use of deadly physical force, of serious physical harm to him or others and that the plaintiff after being shot on the landing ran down the PL6 stairway then the officer's use of deadly force was reasonable and necessary to prevent plaintiff's escape (1892) from custody and for the police officer to defend himself from such deadly physical force and such deadly force used by a police officer would be justified and you would bring in a verdict for the defendant.

However, if you disbelieve the defendant's evidence and disbelieve the testimony of Police Officer Rodriguez that—in that the testimony of Rodriguez that he reasonably believed the plaintiff had committed or attempted to commit a felony or forcible robbery and you find as plaintiff claims that neither the plaintiffs nor the other offender Wise actually lunged at the police officer on the landing and that neither of the perpetrators posed any imminent threat of deadly physical force or serious physical harm to the officer then you will next consider if Police Officer Rodriguez's use of deadly force was unjustified or justified.

If you find that the plaintiff has sustained his burden of proof as to his claim and find that Rodriguez did not have a reasonable belief that a felony of robbery, forcible robbery involving physical harm to Sandusky had been (1893) committed or threatened or even if the police officer did have such a reasonable belief or even observed the crime in progress, that the police officer used deadly physical force in preventing the escape of the unarmed plaintiff as a felon of a forcible robbery by shooting the plaintiff in his back when plaintiff was at the bottom of PL6 stairway after running down that stairway and fleeing from the crime scene then you will next consider the law which applies as to this finding. In other words what I am saying is if you believe the plaintiff's claim you will then consider the penal law of the State of New York and the United States Supreme Court decision which applies to that finding.

Under that law a police officer may use deadly physical force to arrest or prevent the escape of a person from custody only when the officer reasonably believes that the person committed the felony or attempted to commit the felony involving the use or infliction or threatened imminent use or infliction of serious physical harm against another person. (1894) Provided the level of such deadly force used by the officer is reasonably believed by him to be necessary and not excessive to prevent an escape from custody and if where feasible some warning has given.

In the event you believe the plaintiff's claim of how and where the deadly force was used from all of the evidence whether or not Police Officer Rodriguez reasonably believed that the plaintiff had committed or attempted to commit a forcible and violent felony and if so whether or not his—it is for you to determine that and if so, whether or not his use of deadly physical force was reasonably believed by him as a police officer to be necessary to prevent plain-

tiff's escape from custody and it is for you to decide if he gave such sufficient warning where feasible under all of the circumstances that confronted Police Officer Rodriguez immediately prior to and the time of his use of deadly force.

I might say serious physical injuries are defined under the Penal Law as an injury which creates a substantial risk of death or (1895) which causes death or serious and protracted disfigurement or protractive impairment of health of protractive loss or impairment of a bodily organ or function.

Therefore, if you find that the plaintiff has sustained his burden of proof that Police Officer Rodriguez did not observe the crime of a forcible robbery in progress or did not reasonably believe that a violent felony had been committed or was attempted to be committed prior to the shooting then under the law the police officer may not use deadly force and if he does use deadly force and if he does use deadly force sufficient—such force would be unjustifiable.

However if you find that the Police Officer Rodriguez observed the violent robbery and felony in progress or reasonably believed that a violent felony had been committed or was attempted to be committed prior to shooting then you will next consider if the police officer reasonably believed that the use of deadly physical force was necessary of shooting the plaintiff in the back at the bottom of PL6 to prevent the plaintiff's escape and if a (1896) feasible warning was given if you find that Police Officer Rodriguez reasonably believed that the level or extent of his using deadly force of shooting plaintiff in the back at the bottom of PL6 stairway was reasonably necessary to prevent plaintiff's escape and not excessive and a feasible warning was given under all of the circumstances confronting the officer at the time then you would find that the police officer was justified in using deadly force.

ON the other hand if you find that the plaintiff had sustained his burden of proof that Police Officer Rodriguez was not reasonable in believing that the level or the extent of using deadly force was necessary to prevent plaintiff's escape from custody under the circumstances confronting the officer at the time in shooting him in the back at the bottom of PL6 and he failed to give a feasible warning then you would find that his use of deadly force was not justifiable or unjustifiable.

APPENDIX K—Colloquy After Jury Retired.

(1909) MR. KUZMACK: I further request on that same order your Honor that the court read 35.30 of the Penal Law and the paragraph the court pointed out on page 1701 of the decision *Garner vs. Tenessi* to the jury and make it clear that is the law there to be followed in the case.

* * *

(1910) MR. BREITBART: He wants you to read the Supreme Court decision.

THE COURT: I decline to read the language I believe that my instructions on the law covered both the PL 35.30 and the Supreme Court decision.

* * *

(1919) The second request which has been marked Court Exhibit 6. Again requests instructions from Judge of yesterday. Law on use of deadly force Penal Code 35.30 of the Supreme court.

* * *

Now with respect to the re-reading of my instructions to you as to the Penal Law (1920) 35.30. Supreme Court decision that I referred to in my charge as well as the law on the use of deadly physical force that you have requested—you have requested—you also have indicated re-reading of instruction from me approximately the last thirty minutes. I will have re-read to you all of that portion of my instructions to you regarding Penal Law 35.30 and the Supreme Court decision and the use of deadly force and the law in that regard

but I am unclear as to whether you want me also to re-read to you or have it read to you my instructions as to the measure of damages which was part of the last thirty minutes.

So what I am going to do is have you go back to the juryroom and the court officer will give you what you have requested, the documents and list of exhibits and to let me know whether you want to have everything that I instructed you on beginning with the law as to use of deadly force and the Penal Code and Supreme Court decision through the end which could cover also the measure of damages or whether you just want the law.

Supreme Court, U.S.
FILED
OCT 25 1993
OFFICE OF THE CLERK

No. 93-400

IN THE
Supreme Court of the United States
October Term, 1993

NEW YORK CITY TRANSIT AUTHORITY,
Petitioner,

-against-

BERNARD McCUMMINGS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE NEW YORK STATE COURT OF APPEALS

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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OCT 25 1993

33 pp

Counter-Statement of Questions Presented

1. Does this Court have jurisdiction to review a personal injury judgment which the New York State Court of Appeals upheld on the ground of "common law negligence" that is "governed ... by the common law of this State?" (Petition for Writ of Certiorari - hereafter "Pet." - at 2a, 4a).

2. Does this Court have jurisdiction to hear Petitioner's contention that the State court decision deprived it of due process of law when that contention was not raised below, was not decided by the State court, and is raised in this Court for the first time?

3. Does this case present an appropriate vehicle to clarify *Tennessee v. Garner*, 471 U.S. 1 (1985), since the State court did not consider that decision in deciding this case?

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COUNTER-STATEMENT ON JURISDICTION[1]

Petitioner's first "Question Presented" asserts a conflict between this Court's decision in *Garner, supra,* and the State Court of Appeals' decision in this case (Pet. at i). This case, however, did not go to trial as a Fourth Amendment claim and the New York Court of Appeals, affirming the judgment for respondent under the State's common law of negligence, thought *Garner* irrelevant. There is presented, therefore, no substantial federal question under 28 U.S.C. §1257(a).

Petitioner's second "Question Presented" also fails to properly raise a substantial federal question under 28 U.S.C. §1257(a), because the claim that the State court's decision deprived Petitioner of due process of law is being made for the first time before this Court, though Petitioner had ample opportunity to raise the contention below.

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1. Petitioner contends this Court has jurisdiction under "28 U.S.C. §1257(3)" (Pet. at 2). However, 28 U.S.C. §1257 does not contain any numbered subdivisions, such having been removed in 1988. *See* Public Law 100-352. The substance of the repealed subdivision (3) is now in 28 U.S.C. §1257(a), and respondent will assume that Petitioner is contending that that provision gives this Court jurisdiction over this case.

COUNTER-STATEMENT OF THE CASE

I. The Facts[2]

On June 28, 1984, at approximately 8 P.M., Jerome Sandusky entered the 96th Street Station of the Eighth Avenue subway. As he walked down the first staircase (PL 5) toward the southbound platform, he passed a youth (Woods) standing at the top of the staircase and when he reached the landing, he saw two more youths crouched in the far corner. One of these youths (Wise) grabbed him and held him around the neck while the other (McCummings) went through his coat pockets. Sandusky began calling for help (Sandusky: 317-19, McCummings: 897).[3]

Transit Authority (TA) Officers Manuel Rodriguez and Christine Mead were entering the 96th Street Station when they heard Sandusky's calls for help (Mead: 138; Rodriguez: 1517). As the officers approached the staircase with their guns drawn, Woods yelled "Yo" (McCummings: 897; *cf.* Mead: 219). At that point Wise and McCummings ran down the other staircase (PL 6) (Sandusky: 353; Carrera: 491; McCummings: 897; Plaintiff Exhibit [hereafter PX] 4: 1995). Rodriguez came around the corner on

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2. Since respondent prevailed at trial, both of the State appellate courts properly reviewed the evidence in the light most favorable to respondent. See Pet. at 2a, 5a, 19a, 29a-30a. Petitioner, on the other hand, recites the facts as though respondent had *lost* (Pet. at 6-9). The two most egregious examples are Petitioner's assertions that Officer Rodriguez saw respondent participating in the commission of some crime and that Rodriguez shouted a warning before he fired (Pet. at 3, 7-9). Respondent will state the facts as he presented them to the jury which found in his favor.

3. Numerical references are to the Appendix submitted by Petitioner to the State Court of Appeals.

the landing and shot McCummings, who was at the bottom of the staircase (PL 6) in the back (Sandusky: 344-5, 357-8; McCummings: 897).

Based on the foregoing, the jury unanimously found that Rodriguez unjustifiably used deadly force when he shot McCummings in the back (1949, 1951-2, 2088).

II. Prior Proceedings

The Supreme Court of the State of New York, Appellate Division, First Department, affirmed the jury's verdict, noting that "the jury ... clearly accept[ed] ... McCummings' account of the incident" (Pet. at 19a), i.e., that Rodriguez gave no warning and did not see what role, if any, McCummings had in the attack on Sandusky.

The New York State Court of Appeals affirmed the Appellate Division, expressly stating that "the crucial fact [was] that the most favorable view of the evidence for plaintiff is that Officer Rodriguez *did not see a mugging* and did not know whether a violent crime had been threatened or committed" (Pet. at 5a; emphasis in original).

The State Court of Appeals also held that this was a case of "common law negligence," to be decided "by the law of this State" (Pet. at 2a, 4a). This unexceptional statement provoked a motion for reargument by Petitioner. This motion asserted that the case had not been tried as a negligence case and that the Court of Appeals had violated its own precedents by affirming on a theory differing from that on which the case had been tried. However, there is one thing the motion did *not* contain: any claim that the Court of Appeals' holding -- that this was a common law negligence case -- had deprived Petitioner of "due process

of law" (Appendix at 1a). The motion was unanimously denied (Pet. at 61a).

Next, Petitioner sought a stay from the Court of Appeals; this document also contained no claim that Petitioner had been denied "due process of law" (Appendix at 3a). The request was denied.[4]

Finally, Petitioner sought a stay from this Court. For the first time, Petitioner alleged a deprivation of due process of law -- and this was only done in an *exhibit* (Exhibit H) to the stay application. The stay was referred to Associate Justice Clarence Thomas, and was summarily denied on July 28, 1993.[5]

The petition for a writ of certiorari was filed on September 1, 1993.

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4. The denial was orally issued by then-Acting Chief Judge Richard Simons and, pursuant to Court of Appeals' practice, was not reduced to writing.

5. The stay application was accompanied by a "draft" of the petition for a writ of certiorari, which set forth all of the arguments contained in the petition actually filed (Exhibit H to Application for Stay in United States Supreme Court).

Since Justice Thomas was aware of the precise claims Petitioner was making, his summary denial of the stay is an even stronger than usual indication of the lack of merit in those claims. *Stern & Gressman,* Supreme Court Practice, §17.19.

Petitioner has omitted any reference to its stay motion and the denial of that motion from its recitation of the prior proceedings in this case (Pet. at 14).

After the stay was denied, Petitioner paid the judgment to respondent.

SUMMARY OF ARGUMENT

1. The State court's holding, that this case involved "common law negligence" and was "governed ... by the common law of this State," presents no federal question and this Court consequently lacks jurisdiction to review that decision.

2. Petitioner's claim that the above holding deprived it of due process of law was never made in any State court, and is being made for the first time in this Court. Petitioner failed to give the State courts any notice of this claim, and this Court does not have jurisdiction to consider it.

3. This case does not present an appropriate vehicle to clarify the defects Petitioner perceives in *Tennessee v. Garner, supra,* since the State court held *Garner* inapplicable to this case.

REASONS TO DENY THE WRIT

I.
This Court Lacks Jurisdiction to Review a State Court Decision Based Entirely Upon State Common Law.

This Court lacks jurisdiction to review a state court's application of its own law. In this case, the New York Court of Appeals explicitly held that "The theory of [respondent's] case as submitted to the jury was common law negligence ... and ... this is a negligence case governed not by federal law but by the common law of this State" (Pet. at 2a, 4a). That ruling presents no federal question, and this Court consequently lacks jurisdiction to review it.

Petitioner attempts to avoid this conclusion by claiming that the New York Court of Appeals dishonestly labelled respondent's claim one of common law negligence in order to avoid review by this Court of what was really a claim under the Fourth Amendment. There is no dispute between the parties that respondent's complaint contained both a negligence count and a count under 42 U.S.C. §1983 for violation of respondent's rights under the Fourth Amendment. But the Fourth Amendment claim, which would have been controlled by *Garner,* was dismissed by the trial court on the assertion of respondent's trial counsel that the two causes of action were different ways of saying the same thing under State and Federal law, i.e., that Rodriguez's actions were negligent under either or both standards (968-71).

The dismissal of the Fourth Amendment claim occurred just before the end of the trial, which accounts for the numerous references to *Garner* during the trial. It was because of the pendency of that cause of action at the time that respondent submitted his Trial Memorandum and Requests to Charge (Pet. at 64a-74a), and at the time the colloquy cited by Petitioner took place (Pet. at 75a), that *Garner* was referred to as "controlling."

After the dismissal of respondent's Fourth Amendment claim, *Garner* criteria were used as instructive, but that decision was no longer directly involved in this case. The New York Court of Appeals recognized *Garner*'s irrelevance to its decision:

> Defendant cites the Supreme Court's decision in *Tennessee v. Garner* (471 U.S. 1) and argues that that case, in some way, entitled it to a dismissal. But the rule in *Tennessee v. Garner* deals with the protections guaranteed by the Federal Constitution for the *person*

> *being arrested* -- not for the arresting police officer or the municipality. It establishes the minimum standard of care which a police officer must exercise in making an arrest to avoid violation of the arrestee's Fourth Amendment rights. Contrary to defendant's contention, *Tennessee v. Garner* does not create a limitation on plaintiff's right to recover or a shield of immunity for a municipal defendant in a common law negligence action (Pet. 4a; emphasis in original).

In a word, state common law is entitled to give greater protection to a person being arrested than *Garner* demands as a minimum. The Court went on to say that "even if" *Garner*'s constitutional standard were "adopted as the precise standard for common law negligence," a trial would still have been required for such issues as the reasonableness of Rodriguez's belief that "the use of deadly force was appropriate and necessary under the circumstances." *Id.* A more standard formulation of the issue of negligence would be hard to find.

Though Petitioner accuses the New York Court of Appeals of deliberately misstating the nature of respondent's claim, it is significant that neither of the two dissenters, Justices Titone and Bellacosa, saw reason to level such a charge. Surely they would have done so if the court majority was disguising a federal constitutional question as one of common law negligence. Moreover, neither of these Justices dissented from the denial of Petitioner's Motion for Reargument on this (or any other) ground, thereby providing further proof that while they disagreed with the majority, they did not see any fraud in that decision. Professional commentary on the case also

agreed that it was decided under the state's common law of negligence.[6]

Petitioner's imputation of dishonesty to New York's highest court cannot survive the plain fact that the Fourth Amendment claim was dismissed by the trial court and the further fact that the record is replete with references to this as a negligence case. *See, e.g.,* 1687-96 (trial court rules that "I will ... put it to the jury just as we do in any negligence case: Was the defendant negligent ... ?"). *See, also,* 1153-72 (same).

In addition, the numerous references to whether the shooting was "reasonable" or "justified" under the applicable "standard of care" constituted alternative formulations of the burden of proof in a negligence case. *See, e.g.,* 1646-9, 1656-7, 1665-6, 1674-87, 1695-6, 1882-97.[7]

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6. Shortly after the Court of Appeals rendered its decision, the "Trial Practice" column of the New York Law Journal carried a lengthy analysis of this case. The authors, both of whom are leading practitioners and commentators in the negligence field, (a) stated that "[Respondent's] case was based on allegations of common law negligence," (b) noted that "This is not a case of first impression," citing *Flamer v. City of Yonkers,* 309 N.Y. 114 (1950), *McCarthy v. City of New York,* 96 N.Y.S.2d 210 (S.Ct. Bx.Co. 1947), *aff'd.,* 273 A.D.945 (1st Dept. 1948), *lv. to app. den.,* 273 A.D.2d 1007 (1st Dept. 1948), and *Fletcher v. State of New York,* 15 Misc.2d 1014 (Ct. of Clms. 1959), *aff'd.,* 9 A.D.2d 862 (4th Dept. 1959), and (c) concluded that "*McCummings* illustrates ... the application of sound principles of law." *Kelner & Kelner,* Damages for Unreasonable Police Force During Arrest, N.Y.L.J. 4/29/93, p. 3, col. 1-3.

7. It is true that, as Petitioner asserts, during a pre-charge proceeding the trial court said "I am not charging negligence in this case" (Pet. at 11). However, as the context of that remark makes clear (Pet. at 81a), what the court meant was that it would not charge that

(footnote continued on following page)

Petitioner points to its failure to assert defenses such as contributory negligence as further support for its claim that this case was not tried on a negligence theory (Pet. at 5, 24-5). The complete answer to this assertion is that Petitioner *did* assert that precise defense at trial:

> FOR A SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE TO THE ALLEGED CAUSES OF ACTION OF PLAINTIFF AND IN DIMINUTION OF DAMAGES, DEFENDANT, NEW YORK CITY TRANSIT AUTHORITY, ALLEGES, UPON INFORMATION AND BELIEF:
>
> 10. That whatever injuries or damages the plaintiff may have sustained at the time and place mentioned in the verified complaint, were caused, in whole or part, by the culpable conduct of the said plaintiff, said culpable conduct having contributed thereto.
>
> 11. The amount of damages recovered, if any, shall therefore be diminished in the proportion which the said culpable conduct attributable to the plaintiff, bears to the culpable conduct which caused the said damages (19).[8]

(footnote continued from preceding page)
a violation of Petitioner' guidelines for the discharge of weapons constituted negligence *as a matter of law*. Rather, the court would and did (as set forth above) charge the jury on general principles for deciding whether Rodriguez had been negligent.

8. That Petitioner failed to see or raise other available defenses is a curious reason to criticize the State court.

Whatever Petitioner now says about its failure to raise defenses appropriate to a negligence case, the fact that common law negligence was charged was plain on the face of the pleadings. Respondent's First Cause of Action set forth in his Verified Complaint stated:

> That on June 18, 1984 ... BERNARD McCUMMINGS was carelessly and *negligently* assaulted, battered and shot without justification, and under circumstances which did not justify said actions, by police officer Manuel Rodriguez ... (14-15).

The same notice that negligence was charged was contained in Respondent's Verified Bill of Particulars, at (t): "Defendant, New York City Transit Authority, by its agents, servants and/or employees, was negligent, reckless and careless in ... assaulting, battering and shooting plaintiff under circumstances which did not justify said actions ..." (24) And, as pointed out *supra,* pp. 8-9, there were repeated references to negligence throughout the trial. Whatever the explanation for Petitioner's failure to raise certain defenses, that failure cannot be attributed to lack of notice that negligence was charged.

Finally, Petitioner argues that the State court misinterpreted and misapplied its prior case law distinguishing between battery and negligence (Pet. at 24). The short answer to this is that errors of State law do not provide this Court with jurisdiction because they do not present a substantial federal question. *Beck v. Washington,* 369 U.S. 541, 550-4 (1962).[9]

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9. A slightly longer answer is that Petitioner's argument is based on a false dichotomy. Rodriguez was found to have negligently injured respondent because Rodriguez violated the reasonable standard of care

(footnote continued on following page)

Thus, it is clear that common law negligence under New York law was charged, was the only claim remaining when the case was submitted to the jury, and the New York Court of Appeals' decision upheld the jury verdict on that ground. There being no federal question, this Court has no jurisdiction. *See,* in general, *Stern & Gressman,* Supreme Court Practice, §3.19-3.24.

II.
This Court Lacks Jurisdiction Because Petitioner's Due Process Claim Was Not Raised or Decided Below.

Petitioner accuses the New York Court of Appeals of rendering a "bogus" decision in an "aggressive exercise of 'new federalism'" intended to "deprive this Court of the power to review its decision." Having insulted the State court's integrity, Petitioner then throws down the gauntlet to this Court, exhorting it not to "surrender its role as the supreme Constitutional decision maker to a State court bent on usurping it ..." (Pet. at 5-6).

(footnote continued from preceding page)
relating to the seizure of fleeing felons. The fact that one of the acts that was involved was volitional no more prevents the ultimate result from constituting negligence than would the fact that a driver of a car intentionally made a turn that led to an accident that injured someone. The issue is whether the *totality* of action was negligent, and the presence of an intentional act in the spectrum of events does not change the legal character of the result. In other words, Rodriguez was negligent for intentionally shooting respondent under circumstances which did not reasonably justify that act. *See, e.g., Flamer v. City of Yonkers,* 309 N.Y. 114; *Herndon v. City of New York,* 43 A.D.2d 634, 635; *Prosser & Keeton,* Torts, §26, at 155-56 (5th Ed.); 2 C Warren's Negligence, §1.01(2), all of which were cited by the Court of Appeals (Pet. at 2a).

This claim has already been answered by the showing above that the jury decided this case on a common law negligence claim so that the New York Court of Appeals' decision was entirely correct. But a further conclusive answer is that a claim of a sham State ground alleged to deny due process, like any other federal question, must first be raised in the *State* courts. *See*, in general, *Stern & Gressman*, Supreme Court Practice, §3.25-3.26. Petitioner had abundant opportunities to raise this issue below, but did not raise it in either its Motion for Reargument or Motion for a Stay, and made no motion to amend the remittitur on this basis. This Court has no jurisdiction to consider this issue.

Rule 21.1(h) states that where review of a State court judgment is sought, Petitioner must specify the stage of the State court proceedings in which the alleged federal question was raised and the manner in which said question was raised and decided; this specification must include quotation from and reference to the specific parts of the record which establish the foregoing. The petition contains not a single reference to how and when the due process issue was raised or decided (*cf.* Pet. at 5-6) for the very good reason that the issue was not raised until Petitioner's unsuccessful application for a stay in this Court.

Since Petitioner is complaining of the action of the State Court of Appeals, it is conceded that no complaint could have been made in the trial, or intermediate appellate, court. However, Petitioner had ample opportunity to raise the issue in the New York Court of Appeals and did not do so. This Court has repeatedly held that, although raising a federal claim for the first time on a petition for rehearing in a State's highest court is generally insufficient, such a procedure will be sufficient where the action of the State court itself gives rise to the

federal claim. *See, e.g., Brinkerhoff-Faris Trust Co. v. Hill,* 281 U.S. 673, 677-8 (1930). Here, Petitioner filed a Motion for Reargument and a Motion for a Stay and never once referred to a denial of due process.

A federal claim must clearly be identified as such in the petition for rehearing and/or a motion to amend the remittitur. The State court must be made aware of the federal nature of the claim and reject it as such. *See, e.g., Ungar v. Sarafite,* 376 U.S. 575, 582-3 (1964). The New York Court of Appeals was given no hint that Petitioner claimed a denial of due process and so never addressed such a contention.

The decision denying certiorari in *Estate of Wilson v. Aiken Industries Inc.,* 439 U.S. 877 (1978) is dispositive here. In that case, the Petitioner filed a motion for reargument in the Supreme Court of Pennsylvania, referring to that Court's decision as "a patent miscarriage of justice," but the thrust of that argument was on an alleged misinterpretation of State law. Justice Blackmun's concurrence in the denial of certiorari stated: "In all this, any deprival of federal due process is not suggested in so many words." *Id.* at 878-9.

In the present case, Petitioner argued that the State court, by affirming on a ground purportedly not raised below, "violated its own precedent" (Pet. at 12-13, 23-25). However, the cases are legion that a State court's erroneous interpretation and/or application of State law does not present *any* federal question, much less a substantial one. *See, e.g. , Beck v. Washington, supra.*

Petitioner complained in its Motion for Reargument in the State court that that court's decision was "inherently unjust" (Appendix at 1a). However, just as the words

"patent miscarriage of justice" did not adequately convey a claim of the deprivation of due process in *Wilson*, Petitioner's generalized complaint here does not substitute for some language indicating a due process claim. Nor does anything resembling a claim that due process had been denied appear in Petitioner's application for a stay subsequently submitted to the New York Court of Appeals. Nor, finally, did such a claim appear in any motion to amend the remittitur -- because no such motion was ever made.

Having failed to ever raise the due process claim in the State court, Petitioner may not raise it for the first time in this Court. *Raley v. Ohio*, 360 U.S. 423, 434-5 (1959). Contrast *id.* at 435-7. Therefore, this Court has no jurisdiction to hear that claim, *cf. Picard v. Connor*, 404 U.S. 270 (1971), and accordingly, certiorari should be denied. *Estate of Wilson, supra; Beck v. Washington, supra.*

III.
This Case Does Not Present an Appropriate Vehicle for Clarification of *Garner*.

Since no Justice on the New York Court of Appeals, neither those in the majority nor those in dissent, decided this case under the Fourth Amendment as interpreted by *Garner*, this case is an utterly inappropriate vehicle for reexamining or clarifying *Garner*. In this posture, review could proceed only if this Court determined that the New York Court of Appeals had dishonestly said it was applying the State's common law, next determined that it had jurisdiction to accept Petitioner's due process contention, despite the fact that it was neither raised nor decided below, and then studied the record to determine whether respondent's evidence, which the jury accepted,

demonstrated a violation of the Fourth Amendment. All of this would have to be done, of course, without the benefit of any interpretation of *Garner* by the court below. A less appropriate vehicle for a decision on a constitutional issue can hardly be imagined.

If this were not enough to require the denial of the writ of certiorari, Petitioner's asserted "conflict" among the lower federal courts is a figment of Petitioner's imagination. Each of the cases cited by Petitioner turns on its particular facts.[10] In none of these cases has a court expressed the slightest difficulty with the application of this Court's decision in *Garner*. Rather, it is only because of Petitioner's incorrect understanding of *Garner* that these cases are cited as confused and/or in conflict.[11]

If *Garner* were involved here, and it most definitely is not, it would still not be true, as Petitioner asserts, that the New York State Court of Appeals held that *Garner* "barred a police officer from using deadly physical force for the sole purpose of capturing a fleeing felon, no matter how violent or heinous the felony from whose commission the

---

10. In respondent's submissions to both of the State appellate courts, the federal cases cited by Petitioner were distinguished as involving different factual situations.

11. In fact, two of the cases cited by Petitioner as in conflict with each other are from the *same* court. *See, Krueger v. Fuhr,* 991 F.2d 439 (8th Cir. 1993) and *Griffin v. Hilke,* 804 F.2d 1052 (8th Cir. 1986). The fact that the later case did not cite or distinguish the earlier case, and that no *en banc* decision was rendered, establishes that there was, in fact, no conflict. It should also be noted that, although certiorari has been sought and denied in a number of the cases cited by Petitioner (a fact omitted from Petitioner's citations to these cases), in none of the certiorari petitions has a claim of conflict and/or confusion been raised.

Finally, that this Court has *denied* certiorari in every post-*Garner* case cited by Petitioner is powerful evidence that the conflicts and/or confusion alleged by Petitioner do not, in fact or law, exist.

criminal was fleeing" (Pet. at 3; *see, also,* Pet. at 4, 21-3). No such rule is to be found in the State court's opinion. The court stated clearly the criteria it used:

> In deciding the case we must, of course, take the view of the evidence most favorable to the plaintiff. The factual issues were sharply defined: whether Officer Rodriguez came upon the scene during or after the mugging; whether Officer Rodriguez saw any evidence that plaintiff had committed a violent crime; whether, firing from the top of the stairs, Officer Rodriguez hit the unarmed plaintiff in the back and severed his spinal cord while he was running away at the bottom of the stairs or whether Rodriguez hit plaintiff while he was four feet away and lunging at Rodriguez. It was plaintiff's right to have these factual issues decided by the jury. (Pet. at 4a-5a).

Even if it were assumed that the court was applying *Garner* rather than New York's common law of negligence, the issues stated refute Petitioner's claim that the New York Court of Appeals framed a flat rule barring the use of force to capture a fleeing felon under any circumstances.

The jury found, and the appellate courts affirmed, that Rodriguez did not see what, if any, crime had been committed against Sandusky, did not see what, if any, role respondent had in any such crime, knew respondent was unarmed, gave no warning, and attempted no alternative before he shot respondent in the back and rendered him a helpless paraplegic. These facts rendered Rodriguez's actions unreasonable under *any* interpretation of *Garner.* That alone would make this case the worst possible occasion for the reexamination of *Garner.*

Respondent has discussed this point only out of an abundance of caution. The real and sufficient reasons the petition should be denied are that, this being a common law negligence case, there is no federal question presented, and the due process claim, which Petitioner attempts to present to this Court, was not raised or decided below. For both of those reasons, this Court lacks jurisdiction to grant the writ.

CONCLUSION

The petition for a writ of certiorari should be DENIED.

Dated: New York, NY
October 22, 1993

Respectfully submitted,

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JOEL A. BRENNER,
Of Counsel

APPENDICES

Appendix A
Excerpts From Motion for Reargument in New York State Court of Appeals

The inconsistent and unfair treatment the Authority has received in the First Department and in the Court of Appeals

The Authority has received inconsistent treatment on this issue. The Appellate Division, refusing to consider the Authority's argument that *Garner* should not be applied retroactively, held that *Garner* must be applied as the parties had effectively charted their own course. In fact, the Appellate Division's opinion has since been cited, in conjunction with such decisions as *Martin v. City of Cohoes*, 37 N.Y.2d 162, 371 N.Y.S.2d 687 (1985), to support the proposition that an Appellate Court will not review an alleged charge error to which neither party objected. See: *Schwartz v. Cross Bay Excavators, Inc.*, _____ A.D.2d _____, _____ N.Y.S.2d _____, N.Y.L.J., 4/16/93, p.33, col.1-2, (2nd Dept. 1993).

In stark contrast, this Court has chosen to ignore the fact, amply illustrated above, that *Tennessee v. Garner* was deemed applicable by plaintiff, defendant and the trial justice at the trial of this action. Instead, it has analyzed this case as though a charge had been sought or given, as it never was, on *negligence*.

Thus, the Authority could not have its arguments *against* the application of *Garner*, as fundamental error, heard in the First Department because it had charted its own course, in conjunction with plaintiff, at trial. In the Court of Appeals, it cannot have its arguments heard as to the proper interpretation of *Garner*, as if no course had

Appendix A
Excerpts From Motion for Reargument
in New York State Court of Appeals

been agreed upon at trial. This is inherently unjust. For all intents and purposes, the Authority has been denied the appellate review which it is the duty of this Court to provide. The Court of Appeals should rectify its error and review this case and the law charged to the jury as controlling: *Tennessee v. Garner* and Penal Law §35.30.

Appendix B
Affirmation in Support of Motion for Stay of Enforcement of Judgment

COURT OF APPEALS - STATE OF NEW YORK

BERNARD McCUMMINGS,
Plaintiff-Respondent,

-against-

NEW YORK CITY TRANSIT AUTHORITY,
Defendant-Appellant.

LAWRENCE HEISLER, an attorney duly admitted to the practice of law in the courts of this State, affirms the following under the penalties of perjury, pursuant to CPLR 2106:

1. I am associated with ALBERT C. COSENZA, attorney for defendant-appellant, New York City Transit Authority ("Authority"), and I submit this affirmation in support of the Authority's motion for an order pursuant to CPLR 2201 and 5519(c) staying enforcement of a judgment (see Exhibit "A") of the Supreme Court, New York County, entered on March 8, 1990, in favor of plaintiff, Bernard McCummings, in the total sum of $4,343,721.24, pending resolution of such further proceedings as may be taken pursuant to 28 U.S.C. §2101.

2. Plaintiff forcibly mugged an elderly passenger on a subway platform and was shot by an Authority police officer while attempting to flee the scene of the crime. He brought suit against the Authority to recover for the

physical injuries he sustained, claiming that excessive force had been used to effect his arrest.

3. The jury was charged on the principles enunciated in *Tennessee v. Garner,* 471 U.S. 1 (1985) and of New York's justification statute, Penal Law §35.30. A verdict awarding substantial damages was returned in plaintiff's favor, and the Authority appealed to the Appellate Division, First Department, arguing among other things that on the undisputed facts -- plaintiff was convicted on a guilty plea of robbery in the second degree, a Class "C" felony (Penal Law §160.10) -- the police officer used reasonable force as a matter of law in preventing plaintiff's escape. Although that court took note of plaintiff's admission "that he was engaged in robbing and beating" his victim, it affirmed the judgment entered on the jury's verdict. *See McCummings v. New York City Transit Authority,* 177 A.D.2d 24 (1st Dept. 1992).

4. In a memorandum decision dated April 5, 1993, this Court affirmed the order of the Appellate Division, holding that the reasonableness of the officer's conduct presented issues of fact that, on principles of common law negligence, were properly submitted to and resolved by the jury. *See McCummings v. New York City Transit Authority,* 81 N.Y.2d 923 (1993).

The Authority's Reargument Motion

5. Notwithstanding this Court's apparent belief to the contrary, principles of common law negligence were not charged to the jury and thus, self-evidently, played no role

whatsoever in the jury's finding of liability. Indeed, it would have been fundamental error to charge negligence principles, even had the parties requested that the trial court do so, since the gravamen of the action was the alleged use of excessive force -- i.e., the intentional tort of battery.

6. The court's affirmance of the judgment on a theory of liability never raised at trial and never passed on by the jury, a theory which on any view of the facts had no application to the case, prompted the Authority to move by notice of motion dated April 30, 1993, for reargument of the appeal. By order dated July 8, 1993 the court denied the Authority's reargument motion.

Stay of Enforcement of Judgment

7. The Authority strongly believes that this lawsuit raises important federal questions regarding the meaning of *Tennessee v. Garner* (471 U.S. 1) and the circumstances under which a police officer may fire a weapon to capture a fleeing felon.

8. The Authority is aware that the majority concluded that the suit we submit to the jury on a theory of common law negligence and thus implicated no federal issues.

9. The majority's characterization is open to challenge and does not bind the U.S. Supreme Court (*see Wolfe v. North Carolina*, 364 U.S. 177 (1960); *NAACP v. State of Alabama*, 357 U.S. 449 (1958)). After reviewing the record,

Appendix B
Affirmation in Support of Motion for Stay of Enforcement of Judgment

the Supreme Court may conclude as did the dissenters, that the Authority's appeal did raise substantial federal questions.

10. The Authority is mindful that plaintiff has waited for some time to collect damages that he believes are rightfully owing him. Nevertheless, the Authority in defending against plaintiff's suit, and in appealing the adverse judgment, was not simply stalling. It was raising important issues of public policy that ultimately divided the members of this court.

11. The stay the Authority is seeking is a relatively short one. Although the rules of the United States Supreme Court provide that the Authority has 90 days from the July 8th date on which the court denied its motion for reargument (*see* Supreme Court Rule 13.4), the Authority is merely asking for a 30-day stay. The Authority by that time will have served and filed its petition for certiorari and can apply directly to the Supreme Court for an additional stay.

12. A short stay can hardly prejudice plaintiff. As it is, even had the Authority not contemplated a further appeal of this suit, it would take approximately three to six weeks to process payment of the judgment. There are substantial liens in this case which must be pinpointed and satisfied as part of the payout on this judgment.

13. Moreover, a dispute has arisen over the payment of the attorney's fees owed to the original attorney of record in this case, Morris P. Eisen. Mr. Eisen has given a

security interest in his share of the attorneys' fees to Citibank to secure a pre-existing loan. (*See* annexed Exhibit "C" - Citibank letter, and Exhibit "D"). Citibank insists that it be paid Eisen's share of the fee immediately, something the Authority would rather not do without a directive from a court shielding it from any possible liability to Mr. Breitbart, plaintiff's trial counsel. Mr. Breitbart, however, insists that all funds be turned over to him (see Exhibit "D"). Moreover, it is unclear whether Mr. Eisen, now disbarred, may lay claim to any portion of the attorney's fees. Thus, even in the absence of the Authority's petition for certiorari, plaintiff and his trial counsel, David Breitbart, could not reasonably anticipate payment of the entire judgment in less than 30 days.

14. In short, the 30-day stay the Authority is asking for will not necessarily result in any greater delay in the payment of plaintiff's judgment.

15. By contrast, if the Authority is denied a stay, it may be stymied from seeking higher review of this court's decision. To begin with, there is no guarantee that Mr. McCummings, who will be getting the bulk of the proceeds, will preserve his funds while the Authority pursues further appeals. Moreover, if plaintiff should decide to execute, the sheriff will be entitled to substantial fees, in the neighborhood of perhaps $250,000.

Other Stay Proceedings

16. The Authority has applied for a stay of enforcement proceedings in Supreme Court, New York

Appendix B
Affirmation in Support of Motion for Stay of Enforcement of Judgment

County. That stay application is not directly related to the stay proceedings now before this court. In Supreme Court the Authority asked for a stay of execution because of a conflict over a portion of the attorney's fees between Mr. Breitbart, plaintiff's trial counsel and Morris Eisen, plaintiff's attorney of record. Supreme Court Justice Stewart Cohen has denied the Authority's request for interim relief and the motion itself will be heard on Friday, July 23, 1993.

17. The Authority would have moved to stay execution on that ground even had it not been contemplating seeking certiorari.

18. By contrast, the Authority would still be asking this Court for a stay, even if there were no dispute about the fee. As the Court knows, before the United States Supreme Court will entertain the Authority's application for a stay, the Authority must first apply to this Court.

19. For all these reasons, we respectfully request that this Court issue a short stay pending the filing of the Authority's petition for certiorari.

WHEREFORE, defendant-appellant requests that its motion be granted in all respects.

Dated: Brooklyn, New York
July 20, 1993

LAWRENCE HEISLER

BEST AVAILABLE COPY

Supreme Court, U.S.
OCT 29 1993

No. 93-400

IN THE

Supreme Court of the United States

October Term, 1993

NEW YORK CITY TRANSIT AUTHORITY,

Petitioner,

against

BERNARD McCUMMINGS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

REPLY BRIEF TO BRIEF IN OPPOSITION

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REPLY BRIEF TO BRIEF IN OPPOSITION

Statement of the Case

Respondent's brief stands as monument to distortion and deception. Respondent argues that the Fourth Amendment *Garner* claims disappeared before the end of the trial and played no role in the jury's finding against petitioner. The simple response to this argument is that it is plainly and palpably false. Respondent cannot explain why the trial court decided to *charge Garner* as *controlling* if the Fourth Amendment question had long become moot (Pet. 82a-86a). He cannot explain the *post-trial* colloquy during which the trial court insisted that it had fully explained to the jury that *Garner* controlled the suit (Pet. 87a). He cannot explain why *no* portion of his own request to charge makes the slightest reference to negligence, nor why both the Appellate Division majority and dissent felt that *Garner* controlled, if the Fourth Amendment question had long since disappeared.

Simply put, if negligence played *any* part in this lawsuit, respondent would have provided this Court with *reproduced evidence* from the trial that it did.

Now it is true that respondent makes numerous references to the trial record, references which he assures this court prove negligence figured prominently at trial. Again, the simple response to those assertions is that respondent is not telling the truth. In this reply ("P.Rep."), petitioner has reproduced those excerpts (P.Rep. 172a-203a); to the extent they are relevant—and most are not—they convincingly show that the parties and trial court agreed that the sole standard the jury was to apply in determining whether the shooting was justified was *Garner's*. It is not too strong to say that some of respondent's assertions, specifically the claim on p. 8 that the trial court ruled that it would submit the case on negligence grounds, go beyond distortion and border on falsehood.[1]

In short, the jurisdictional inquiry this Court must conduct is a simple one. If respondent's account is true, then this Court lacks

[1]Respondent is guilty of another falsehood in Footnote 8 where he asserts that petitioner has paid him the judgment. Of course, this (Footnote continued on next page.)

jurisdiction to hear Point I. After examining this reply and exhibits, the Court should have little difficulty in finding that it has jurisdiction to hear the *Garner* point.

Contrary to respondent, this Court also has jurisdiction to hear the due process claim. First, there is strong reason to doubt that petitioner was required to point out to the Court of Appeals, the very body which had unexpectedly deprived it of due process that it had acted in violation of fundamental fairness. *See Pruneyard Shopping Center v. Robbins*, 447 U.S. 74, 85-87, fn.9 (1980). In fact, petitioner alerted the Court of Appeals to the due process violation, in an extensive motion for reargument and rehearing (*see* App. L). The bowdlerized version of the motion which respondent has reproduced does not do justice to the Authority's position. Thus, this Court has the power to pass on the due process claim, a claim which arises out of the Court of Appeals' challenge to this Court's role as the ultimate constitutional law decisor.

ARGUMENT

POINT I

The suit was decided solely on *Garner* grounds. Hence this Court has jurisdiction to decide this suit, and correct the Court of Appeals' error.

The task before this Court is engagingly simple. The Court has before it respondent's trial memorandum (Pet. 69a), his request to charge (Pet. 73a), *the charge the trial court actually read to the jury* (Pet. 82a-86a), the colloquy between counsel and the trial judge *after* the jury had retired (Pet. 87a), and the jury's request for clarification of *Garner* (Pet. 87a-88a). If this case was decided on common law negligence grounds, this Court aided by respondent, should have no trouble finding proof of it. No such proof can be found, because no such proof exists.

(Footnote continued.)
Court's jurisdiction would not be affected even had the judgment been paid (*see e.g. Porter v. Lee*, 328 U.S. 246, 251 [1946]; *Bank of Marin v. England*, 385 U.S. 99 [1966]). In fact, the Authority is currently holding approximately $1.7 million of the *McCummings* judgment which is tied up in unrelated litigation.

Now respondent in his brief on page 8 points to one carefully doctored exchange from the record to argue that negligence was submitted to the jury: "I will put it to the jury just as we do in any negligence case . . . Was the defendant negligent?" The "quote," however, does not say what counsel says it does. What the quote actually reflects is the following.

During the trial, petitioner asked the trial court to submit to the jury special interrogatories outlining the different factual scenarios of the shooting (*see* P.Rep. 147a, 201a-203a). The court responded that it would submit interrogatories "just [like] in a New York negligence case" where, typically, the jury answers a single question, i.e.: 'was defendant negligent?'[202a] The actual interrogatory the jury was given here reflects the court's decision (P.Rep. 144a-145a). The jury below was simply asked to decide whether Officer Rodriguez was justified in shooting McCummings. Tellingly, too, the verdict sheet says nothing of "negligence". In short, the excerpt has *nothing to do* with the theory under which this suit was tried. To argue that it does borders on dishonesty.

Again, on pp. 8-9 respondent cites to numerous record references—1153-1172 *[P.Rep. 172a-183a]*, 1646-1649*[P.Rep 183a-185a]*, 1656-1657 *[P.Rep. 186a-187a]*, 1665-1666 *[P.Rep 188a-190a]*, 1674-1687*[P.Rep. 192a-200a]*, 1695-1696 *[P.Rep. 201a-203a]*, 1882-1897*[P.Rep. 82a-86a]*—to argue that (1) negligence was the key to this suit and (2) that whenever someone at trial spoke about "justification," they were actually referring to common law negligence. The cited portions have been reproduced here as App. X (P.Rep. 172a). Once again, the excerpts do not say what respondent pretends they do.[2] To the extent these record excerpts are relevant at all, they show the parties agreed

[2]The most charitable thing one can say about the author of respondent's brief is that he is unfamiliar with the trial record. PP. 1153-1172 contains irrelevant colloquy about petitioner's 1986 rules which the trial court withdrew because they did not apply when the 1984 McCummings shooting took place. The colloquy then wanders off into an aimless discussion of petitioner's other internal rules governing Rodriguez' conduct in 1984, which the trial court thought did not address whether deadly force could be used against a fleeing felon and which, in any event, were more lenient than *Garner*. PP. 1646-1649 and 1656-1657 contain an irrelevant discussion about whether the Authority was negligent in training Officer (Footnote continued on next page.)

that the question of justification was to be measured by *Garner's* Fourth Amendment standard and no other.

As noted, respondent argues that when the parties debated whether Rodriguez acted "reasonably" or "justifiably" in firing his gun they were debating about negligence. Besides being factually wrong, respondent's assertion proves too much. Under respondent's reasoning *Garner* itself can be classified as a "common law negligence" case because this Court analyzed police conduct by referring to what is or is not reasonable. The Fourth Amendment itself, upon whose text *Garner* rests, bars searches and seizures which are "unreasonable". Is a Court which decides whether a particular search violates the Fourth Amendment deciding a question of common law negligence rather than constitutional law? The question answers itself.

Respondent's pleadings and the Authority's response

Respondent next relies on the hodge-podge of poorly pleaded allegations in his first cause of action (P.Rep. 168a) to argue that negligence was central to this case and that the Authority recognized this by asserting the common law defense of comparative negligence. Respondent's argument is worse than meritless, it is downright meretricious. One must recall that at the beginning of this litigation respondent strenuously insisted that he had nothing to do with robbing Mr. Sandusky, but was an innocent bystander struck by a stray bullet (*see e.g.* P.Rep. 148a-149a). Even after he had been *imprisoned* on his own plea, respondent, at a deposition in a New York State *prison*, lamented that he had been the victim of a mistaken identity, that he had nothing to do with robbing or strangling anyone (P.Rep. 170a-171a). The negligence allegations in respondent's complaint *and petitioner's response to them* were founded on these assertions of innocence.

At trial, of course, respondent dropped his earlier pose. He admitted that he had been robbing and beating Mr. Sandusky, but

(Footnote continued.)

Rodriguez. PP. 1665-1666 continues on to pp. 1667-1669 where the parties and court all agree that *Garner* controls. PP. 1674-1687 contains a meandering colloquy about the charge; references to negligence are conspicuously absent; pp. 1695-1696 are also reproduced as Appendix N, they were discussed above at p. 3; pp. 1882-1897 is the jury charge reproduced at Pet. 82a.

insisted that he was entitled to recover under *Garner* (*see* Third Cause of Action, P.Rep. 167a-168a). Alternatively, respondent argued that New York's Penal Law §35.30 was unconstitutional, and thus the petitioner could not rely on the Penal Law privilege to defeat respondent's suit (Pet. 73a, 76a). It was these theories, and these only which were submitted to the jury, and it was these theories which petitioner defended against at trial (P.Rep. 152a).

Dissent

Nor did the dissenters agree that the suit was submitted on common law negligence grounds. Judge Bellacosa expressly recognized that the majority, by deciding the suit as if it had been a routine negligence case, had "procedurally sidetracked" *Garner* (Pet. 14a). This is an odd choice of words if the majority was affirming a judgment on the very basis that the jury decided the case. In short, Judge Bellacosa recognized that the majority had been less than candid when it held that it was deciding a routine negligence case.

Facts

Despite respondent's crude caricature, the evidence bears out the *McCummings* dissenters that as a matter of law Rodriguez was justified in using deadly force under *Garner.* Rodriguez insisted that he saw McCummings and Wise strangling the elderly Sandusky (P.Rep. 204a-205a). If he did not actually see them do so—and there is no reason, contrary to the majority, to doubt that he did[3]—he certainly heard screams and saw a badly beaten, bleeding, semi-conscious old man (see Appendices P, Q, P.Rep 150a-151a). If, as the majority suggested, the jury was justified in concluding that Rodriguez lacked probable cause to believe that McCummings had committed a *violent* felony, on is forced to the absurd conclusion that Rodriguez lacked probable cause to suspect that McCummings was guilty of *anything.*

[3]The Court is strongly urged to read Rodriguez' chilling account of how he saw McCummings and Wise strangling Sandusky (P.Rep. 204a-205a). While it may be true that this Court will usually defer to a state court's declaration about the facts developed at trial, the Court should be wary of doing so here. The two impassioned dissents as well as the majority's unprincipled conclusion that this case was decided on negligence grounds should lead this Court to view the majority's statements with suspicion.

That a violent felony had been committed was appallingly plain (Pet. 6-9). Equally plain is that Rodriguez had more than probable cause to believe that unless he fired, Wise and McCummings would have escaped. As respondent himself conceded at trial (P.Rep. 169a), the two had opened a 17 to 20 foot lead over the officer who was roughly 20 years older than they were. Under the circumstances, a reasonable officer had only one option: let the two who had been strangling the old man get away or use deadly force. Indeed, that Rodriguez' decision was objectively reasonable is shown by the circumstance that Wise, though shot in the arm, managed to escape. He was only arrested when he turned up at a hospital emergency room seeking aid for his wounds.

Warning

Respondent argues that the Court of Appeals could have affirmed the judgment because Rodriguez, contrary to *Garner*, gave no warning before he shot the fleeing McCummings. The argument runs into several difficulties, the first being the facts. Everyone at trial, Rodriguez, Sandusky, and Officer Mead, testified to a warning (P.Rep. 204a). McCummings was never asked whether he had heard a warning, and even had he denied hearing one, that denial would not be enough to create a question of fact (*see Ford v. Childers*, 855 F.2d 1271, 1276 [7th Cir. 1981]).

Second, the Court of Appeals opinion mentions nothing about "warning" and the Court may not have considered the issue. If so, a remand may be in order. On the other hand, perhaps the Court of Appeals adopted the view of some Circuits (*see e.g. Acoff v. Abston*, 762 F.2d 1543, 1547 [11th Cir. 1985]) and believed that a simple warning of "halt police," much like the warning Rodriguez gave here, was not enough, and that Rodriguez should have warned McCummings that he was going to shoot. This understanding of *Garner's* warning requirement clashes with the understanding of other Circuits (*see Ford v. Childers*, 855 F.2d 1271, 1276 [7th Cir. 1988]) and should be resolved by this Court.

Negligent battery—defending the indefensible

The quality of respondent's argument can best be grasped by examining respondent's exquisitely convoluted footnote 9. Respondent twists himself into contortions as he attempts to explain how a police officer who purposefully shoots a fleeing felon is really guilty of negligence.

And while respondent chides petitioner for criticizing the Court of Appeals, the fact remains that petitioner's criticism is not misplaced. Not a single source which the Court of Appeals cited proves that New York recognizes the monstrous hybrid of "negligent battery". *Flamer, supra* does not prove it. (P.Rep. 153a, Defendant's Brief in *Flamer,* defendant fails to contest the existence of negligent battery.) (P.Rep. 161a, New York Pattern Jury Instructions §3:3, *comment*); *Herndon, supra* does not prove it; *Prosser and Keeton* do not prove it, and the section of Prosser to which the Court of Appeals cited has nothing to say about negligent battery.[4] Indeed, to cite *Prosser and Keeton* as endorsing the existence of negligent battery is to libel both, since *Prosser and Keeton* expressly conclude that to speak of negligent battery is to speak nonsense. *See Prosser and Keeton on Torts,* 5th Ed., §9, p.41, §10, p. 46.

If petitioner has treated the Court of Appeals harshly, that harshness was deserved. Presented with an opportunity to pass on an important Constitutional issue, the Court engaged in a dishonest evasion, deciding a case which was never tried. To the extent that it addressed the important *Garner* issue, it reached the absurd conclusion that *Garner* only spoke to a felon's rights and did not outline the circumstances when the use of deadly force was Constitutionally permissible.[5]

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[4]The obscure New York negligence manual, *Warren's,* which the Court of Appeals cited also has nothing to say about "negligent-battery," but notes that a police officer who negligently drives a police car is liable in damages. *See 2C Warren's, Negligence,* §84.01[1][b] (corrected citation appearing in official New York Reports).

[5]The Court's decision means that in any §1983 action brought in a New York State court, New York courts will be compelled to hold that *Garner* has nothing to say about when a police officer *may* fire a gun without running afoul of the Fourth Amendment.

Forced to defend the indefensible, respondent mimics the tactics of the Court of Appeals. He distorts the trial record and pretends that the *McCummings* case presented legal issues no different from those presented by a routine intersection collision suit. The record in this case is clear; the law in this case clear; and this Court's own principles of review are crystal clear. This court will not shirk the chance to review an important Constitutional issue, no matter how feverish a state court's attempt to prevent it from doing so. It is respectfully submitted that this suit presents important Constitutional questions which this Court should address.

POINT II

The Court has jurisdiction to entertain the petitioner's due process claims which are meritorious and should be heard.

Respondent is wrong when he argues that this Court lacks jurisdiction to hear Point II. This is not a typical case where a petitioner who has tried and appealed an issue in state court, suddenly awakens to the federal claim he might have raised and then petitions this Court for certiorari. Rather, this is a case in which a state's highest appellate court has *itself* deprived petitioner of due process. It did so by deciding a case contrary to its own principles of procedural and substantive law (*see* P.Rep. 163a), thereby catching petitioner completely by surprise. As this Court noted in *Pruneyard Shopping Center v. Robbins*, 447 U.S. 74, 85-87, fn.9 (1980) ". . . this Court has held federal claims to have been adequately presented *even though not raised in lower state courts* when the highest state court renders an unexpected interpretation of state law or reverses its prior interpretation . . ." (emphasis supplied). Thus, even had petitioner *never* argued below that it was deprived of due process, it could still present its claims to this Court.

In fact, petitioner raised a due process claim when it moved in the Court of Appeals for a rehearing (see App. L). At great length, petitioner argued that both parties had insisted that *Garner* governed this action. (*See* P.Rep. 112a to 125a; *see also*

P.Rep. 94a, Table I.) Petitioner demonstrated how it would have tried the case differently had it known that it could be liable on "common law negligence" grounds. (*See e.g.* P.Rep. 110a, 111a, 126a; *see also generally,* P.Rep. 112a-125a.) Petitioner also pointed out that under its own principles of appellate review, the Court of Appeals could not decide a case on a theory which was never submitted to the jury (P.Rep. 115a-117a); and petitioner showed that New York law does not recognize the tort of "negligent battery" (*see* P.Rep. 125a-128a).

Finally, petitioner complained that the manner in which the Court of Appeals decided this suit violated principles of elemental fairness, i.e., principles of due process. Thus, the Authority asserted that "simple justice" (P.Rep. 117a) required the Court of Appeals to decide the case as it was actually tried (*see also* P.Rep. 123a). Petitioner noted that it had been "unfairly" treated by the Court of Appeals (P.Rep. 124a) and that it had been "denied the Appellate review . . . which [was due it]" by the Court in a manner which was ". . . inherently unjust" (P.Rep. 125a).

The fair intendment of this language was to put the Court of Appeals on notice that it had deprived petitioner of "due process". As this Court has frequently noted, a party need not recite "book and verse" to the precise constitutional provision at issue in order to invoke this Court's jurisdiction. *See Eddings v. Oklahoma,* 455 U.S. 104, 113 (1982). So long as the "clear intendment" of the parties was to raise a constitutional claim, the court has jurisdiction to hear it. *See People v. Zimmerman,* 278 U.S. 63 (1924). (*See e.g. Taylor v. Kentucky,* 436 U.S. 478, 481, fn.10 [1978]; [reference to "fundamental principles of judicial fair play" held to raise federal due process claims]; *Braniff Airways v. Nebraska Board,* 347 U.S. 590, 598, ["clear intendment" to raise due process claims enough to lodge jurisdiction in this Court, even though petitioner never explicitly mentioned due process in state proceedings]. (*See also Wood v. Georgia,* 450 U.S. 261, 264 [where record reveals facts giving rise to due process violations Court may hear it even if petitioner never explicitly referred to due process below]. *See also Vachon v. New Hampshire,* 414 U.S. 478 (1974); *see Bridge Proprietors v. Hoboken Co.,* 68 U.S. 116, 143 (1863).

If one of the factors this Court looks to in determining jurisdiction is whether the state court has been given a fair opportunity to correct its error on a point of federal law this Court should readily conclude that it has jurisdiction to hear Point II. Unquestionably, the New York Court of Appeals knew that petitioner contended it had been denied due process. Petitioner's rehearing papers were detailed, strongly reasoned and persuasive. Unless one supposes that the Court of Appeals is incapable of reading only one conclusion is possible: the Court of Appeals knew that it was depriving petitioner of due process, and because it knew what it was doing, it did not care to respond to petitioner's request for a rehearing.

In short, the court has the power to hear Point II of the Authority's petition.

Conclusion

For these reasons a writ of certiorari should be issued to review the opinion and judgment of the New York Court of Appeals.

Respectfully submitted,

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Petitioner New York City Transit
Authority

LAWRENCE HEISLER
LAWRENCE A. SILVER
Of Counsel

APPENDIX L—Notice of Motion for Reargument to the New York State Court of Appeals, Affirmation of Lawrence Heisler in Support of Motion and Memorandum of Law.

NOTICE OF MOTION

COURT OF APPEALS

STATE OF NEW YORK.

BERNARD MCCUMMINGS,

Plaintiff-Respondent,

against

NEW YORK CITY TRANSIT AUTHORITY,

Defendant-Appellant.

SIRS:

PLEASE TAKE NOTICE that upon the annexed affirmation of Lawrence Heisler, the exhibits annexed hereto, the memorandum decision of this Court dated April 5, 1993, and upon all the pleadings and proceedings heretofore had herein, defendant NEW YORK CITY TRANSIT AUTHORITY will move this Court at the courthouse at 20 Eagle

Street, Albany, New York on the 17th day of May, 1993 at 10:00 in the forenoon for an order granting reargument of the Court's decision and for such other and further relief as to this Court may seem just and proper in the premises.

Dated: Brooklyn, New York
April 30, 1993

Yours, etc.,

ALBERT C. COSENZA
Attorney for Defendant-Appellant
NEW YORK CITY TRANSIT
AUTHORITY
TORTS DIVISION, Room 1147
130 Livingston Street
Brooklyn, New York 11201
1-718-694-3851

TO: JOEL BRENNER, ESQ.
Attorney for Plaintiff-Respondent
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AFFIRMATION

COURT OF APPEALS

STATE OF NEW YORK.

BERNARD MCCUMMINGS,

Plaintiff-Respondent,

against

NEW YORK CITY TRANSIT AUTHORITY,

Defendant-Appellant.

LAWRENCE HEISLER, an attorney duly admitted to the practice of law in the courts of this State, hereby affirms the following under penalty of perjury:

1. I am associated with ALBERT C. COSENZA, attorney for the defendant-appellant NEW YORK CITY TRANSIT AUTHORITY. I submit this affirmation in support of appellant's motion for an order granting reargument of the Court's memoranda decision of April 5, 1993 (Exhibit "A"), in which this court, with two judges dissenting, affirmed a $4.3 million judgment awarded plaintiff Bernard McCummings who was shot while fleeing from a New York City Transit Authority police officer.

2. The McCummings case which the majority decided was never tried. The jury charge which the majority analyzed was never given. Because the majority distorted the record, misstated the facts, and misinterpreted the law, and because the majority, perhaps unknowingly, destroyed New York's law of justification, we respectfully ask the Court to reconsider its decision.

3. The majority begins its memorandum by stating that this lawsuit was "submitted to the jury" on a theory of "common law negligence" (Slip Opinion p. 2). The Court's statement is astonishing. This suit had as much to do with principles of common law negligence as it had with principles of anti-trust law.

4. The sole question presented to the jury was whether Officer Rodriguez was justified in using deadly force pursuant to the standards set by *Tennessee v. Garner* and Penal Law §35.30. This is established by

(a) plaintiff's request to charge (2085-87);

(b) his trial memo (2073-84);

(c) the Authority's request to charge (RA A1-A3);

(d) the colloquy throughout the trial and during the charge conference (*see e.g.* 1665-68), and most crucially;

(e) the charge the trial court gave to the jury (*see esp.* 1890-97);

(f) the questions the jury asked during its deliberations (1918-19);

(g) the court's recharge (1922)[1], and

(h) the First Department's finding that the parties consented to the case being determined pursuant to *Tennessee v. Garner* and the Penal Law §35.30.

5. It may be worthwhile at this point to consult the following two tables. Table 1 compares the charge the trial court gave the jury to the charge plaintiff requested and the language of *Garner*. Table 2 compares the charge with the text of Penal Law §35.30 and plaintiff's request to charge. One fact becomes immediately apparent. There is not a hint of "negligence", common law or otherwise in the case below, nothing beyond the parties' contentions about *Garner* and the Penal Law.

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[1]The trial judge stated explicitly "I believe that my instructions on the law covered both the Penal Law §35.30 and the Supreme Court decision" (1910; see also 1893 [directing jury to "consider the Penal Law of the State of New York" and the United States Supreme Court decision which applies to that finding"]; 1918).

TABLE 1

CORRESPONDENCES BETWEEN JURY CHARGE, *TENNESSEE v. GARNER* AND PLAINTIFF'S CHARGE REQUEST

CHARGE	*TENNESSEE v. GARNER*	*PLAINTIFF'S REQUEST*
"Generally under the law it is held by the United States Supreme Court the use of deadly physical force by a police officer is unreasonable and unjustified if it is merely intended to prevent a felon from fleeing from a crime and who poses no immediate threat of serious physical injury or harm to an officer or others." (1890)	"The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable ... where the suspect poses no immediate threat to the officers and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so." (471 US 1, 11) Deadly force "may not be used unless it is necessary to prevent the escape, and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others". 471 US at 3	"The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable ... where the suspect poses no immediate threat to the officers and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so." (2085-86)

"However, in this case under the law as held by the United States Supreme Court decision and under the New York State Penal Law, Section 35.30 a police officer may use deadly force to prevent the scape [*sic*] of any criminal offender or suspect if the police officer reasonably believes that a person committed or attempted to commit any type of criminal offense felony or otherwise but the suspect is armed with a firearm or a deadly weapon or it is necessary for the police officer to defend itself or herself or another person from what the police officer reasonably believes to be the use or imminent use of deadly physical force or from the threat of serious physical harm against him or her as a police officer or another person. Such use of deadly force by a police officer under those circumstances would be justified under the law.

Eighteen states allow (including New York under Penal Law §35.30) "the use of deadly force only if the suspect has committed a felony involving the use or threat of physical or deadly force or is escaping with a deadly weapon, or is likely to endanger life or inflict serious physical injury if not arrested."

471 US at 17

Where the officer has probable cause to believe that the suspect poses a threat of serious physical injury, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical injury, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given. (2086)

Where the officer has probable cause to believe that the suspect poses a threat of serious physical injury, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical injury, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given. (2086)

CHARGE	*TENNESSEE v. GARNER*	*PLAINTIFF'S REQUEST*
"Therefore if you believe the defendants evidence and the testimony of Police Officer Rodriguez that he reasonably believed that the plaintiff committed or attempted to commit a felony of forcible robbery and that the plaintiff and another felony offender, Wise, lunged at him on the landing between PL5 and PL6 and the police officer Rodriguez reasonably believed that the plaintiff posed a threat of eminent use of deadly physical force, of serious physical harm to him or others and that the plaintiff after being shot on the landing ran down the PL6 stairway then the officer's use of deadly force was reasonable and necessary to prevent plaintiff's escape from custody and for the police officer to defend himself from such deadly physical force and such deadly force used by a police officer would be justified and you would bring in a verdict for the defendant.		"6. If you find that Police Officer Rodriguez shot Bernard McCummings as he and Wise lunged at Officer Rodriguez thereby putting him in imminent fear of death or serious physical injury then you must find in favor of the defendant, the New York City Transit Authority. If on the other hand, if you find that Police Officer Rodriguez fired his weapon at Bernard McCummings while he was fleeing after having comitted a robbery and that one of the bullets struck him in the spine at the bottom of the steps (PL 6) and that he was unarmed and posed no significant threat of death or serious physical injury to either police officers Rodriguez or Meade or to a third person, then you must find in favor of the plaintiff."

However, if you disbelieve the defendant's evidence and disbelieve the testimony of Police Officer Rodriguez that—in that the testimony of Rodriguez that he reasonably believed the plaintiff had committed or attempted to commit a felony or forcible robbery and you find as plaintiff claims that neither the plaintiffs nor the other offender Wise actually lunged at the police officer on the landing and that neither of the perpetrators posed any eminent threat of deadly physical force or serious physical harm to the officer then you will next consider if Police Officer Rodriguez's use of deadly force was unjustified or justified.

CHARGE	*TENNESSEE v. GARNER*	*PLAINTIFF'S REQUEST*
"Under that law a police officer may use deadly physical force to arrest or prevent the escape of a person from custody only when the officer reasonably believes that the person comitted the felony or attempted to commit the felony involving the use or infliction or threatened eminent use or infliction of serious physical harm against another person. Provided the level of such deadly force used by the officer is reasonably believed by him to be necessary and not excessive to prevent an escape from custody and if where feasible some warning has given.	"Where the officer has probable cause to believe that the suspect poses a threat of serious physical injury, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical injury, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given. 471 US at 11-12	"Where the officer has probable cause to believe that the suspect poses a threat of serious physical injury, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical injury, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given. (2086)

In the event you believe the plaintiff's claim of how and where the deadly force was used from all of the evidence whether or not Police Officer Rodriguez reasonably believed that the plaintiff had committed or attempted to commit a forcible and violent felony and if so whether or not his—it is for you to determine that and if so, whether or not his use of deadly physical force was reasonably believed by him as a police officer to be necessary to prevent plaintiff's escape from custody and it is for you to decide if he gave such sufficient warning where feasible under all of the circumstances that confronted Police Officer Rodriguez immediately prior to and the time of his use of deadly force.

TABLE 2

CORRESPONDENCES BETWEEN JURY CHARGE AND PENAL LAW §35.30

CHARGE	*PENAL LAW §35.30*
"However, in this case under the law as held by the United States Supreme Court decision and under the New York State Penal Law, Section 35.30 a police officer may use deadly force to prevent the scpae [*sic*] of any criminal offender or suspect if the police officer reasonably believes that a person committed or attempted to commit any type of criminal offense felony or otherwise but the suspect is armed with a firearm or a deadly weapon or it is necessary for the police officer to defend itself or herself or another person from what the police officer reasonably believes to be the use or imminent use of deadly physical force or from the threat of serious physical harm against him or her as a police officer or another person. Such use of deadly force by a police officer under those circumstances would be justified under the law. (1890-91)	Penal Law §35.30, subd.d 1 provides: 1. A peace officer, in the course of effecting or attempting to effect an arrest, or of preventing or attempting to prevent the escape from custody, of a person whom he reasonably believes to have committed an offense, may use physical force when and to the extent he reasonably believes such to be necessary to effect the arrest, or to prevent the escape from custody, or to defend himself or a third person from what he reasonably believes to be the use or imminent use of physical force; except that he may use deadly physical force for such purposes only when he reasonably believes that:

However, if you disbelieve the defendant's evidence and disbelieve the testimony of Police Officer Rodriguez that—in that the testimony of Rodriguez that he reasonably believed the plaintiff had committed or attempted to commit a felony or forcible robbery and you find as plaintiff claims that neither the plaintiffs nor the other offender Wise actually lunged at the police officer on the landing and that neither of the perpetrators posed any eminent threat of deadly physical force or serious physical harm to the officer then you will next consider if Police Officer Rodriguez's use of deadly force was unjustified or justified. (1892)

Therefore, if you find that the plaintiff has sustained his burden of proof that Police Officer Rodriguez did not observe the crime of a forcible robbery in progress or did not reasonably believe that a violent felony had been committed or was attempted to be committed prior to the shooting then under the law the police officer may not use deadly force and if he does use deadly force sufficient—such force would be unjustifiable.

(a) The offense committed by such person was:

(i) a felony or an attempt to commit a felony involving the use or attempted use or threatened imminent use of physical force against a person; or

(ii) kidnapping, arson, escape in the first degree, burglary in the first degree or any attempt to commit such a crime; or

(b) The offense committed or attempted by such person was a felony and that, in the course of resisting arrest therefor or attempting to escape from custody, such person is armed with a firearm or deadly weapon; or

(c) Regardless of the particular offense which is the subject of the arrest or attempted escape, the use of deadly physical force is necessary to defend the peace officer or another person from what the officer reasonably believes to be the use or imminent use of deadly physical force.

However, if you find that the police Officer Rodriguez observed the violent robbery and felony in progress or reasonably believed that a violent felony had been committed or was attempted to be committed prior to shooting then you will next consider if the police officer reasonably believed that the use of deadly physical force was necessary of shooting the plaintiff in the back at the bottom of PL6 to prevent the plaintiff's escape and if a feasible warning was given if you find that Police Officer Rodriguez reasonably believed that the level or extent of his using deadly force of shooting plaintiff in the back at the bottom of PL6 stairway was reasonably necessary to prevent plaintiff's escape and not excessive and a feasible warning was given under all of the circumstances confronting the officer at the time then you would find that the police officer was justified in using deadly force.

On the other hand, if you find that the plaintiff had sustained his burden of proof that Police Officer Rodriguez was not reasonable in believing that the level or the extent of using deadly force was necessary to prevent plaintiff's escape from custody under the circumstances confronting the officer at the time in shooting him in the back at the bottom of PL6 and he failed to give a feasible warning then you would find that his use of deadly force was not justifiable or unjustifiable.

(1895-96)

6. Simply put, the outcome of this lawsuit did not hinge on an interpretation of common law principles. Instead, it hinged on an interpretation of statutory and constitutional principles: specifically, did the Fourth Amendment, as interpreted by the Supreme Court in *Garner,* and New York's Penal Law §35.30 allow Officer Rodriguez to use his weapon under the circumstances presented at trial?

7. The parties, in short, charted their own course by agreeing to have this lawsuit turn solely on whose interpretation of *Garner* and the Penal Law was correct, plaintiff's or the Authority's. Thus, the majority's two critical conclusions, (a) that this suit was decided on principles of "common law negligence" and (b) that a police officer who complied with the Penal Law and *Garner* could still face civil liability runs afoul of one crucial fact: *the parties explicitly agreed that if Officer Rodriguez complied with the Penal Law and Garner, the Authority would escape civil liability.*

8. There are other problems with the Court's decision to affirm the judgment on the basis of "common law negligence". Both parties agreed that Police Officer Rodriguez deliberately and intentionally shot Bernard McCummings; the shooting was not an accident. The sole point in dispute was whether that shooting was justified. In the factual context of this lawsuit, the notion of a negligent assault or battery is an oxymoron, a conceptual contradiction in terms. (*See e.g. Panzella v. Burns,* 169 A.D.2d 824 [2nd Dept. 1991]). By introducing principles of negligence to the wholly inappropriate area of intentional police conduct, the court has thrown into confusion an array of what has heretofore been thought to be settled principles of law. To take one obvious example, will a party who claims to have been

intentionally shot by a defendant now have the benefit of a three-year negligence statute of limitations, should he decide to frame his suit on "common law negligence" grounds?

9. The majority opinion also contains serious misstatements of law. In affirming the Appellate Division's judgment, the majority declared that neither the Penal Law nor *Garner* establishes standards for permissible action in civil suits. Penal Law §35.30 in the Court's view, merely protected a police officer from criminal prosecution. The same officer, however, stood exposed to civil liability if he or she took action which a jury found unreasonable, even though those actions complied with the provisions of the Penal Law.

10. This court doubtless thought that it was treating only the narrow question of when a police officer could be civilly liable for firing a weapon at a fleeing felon. But what this court's decision has done is effectively destroy the entire foundation of New York's law of justification. For decades courts and attorneys have looked to the Penal Law to discover under what circumstances a person's intentional conduct would be justified and free from all liabilities, civil or criminal. No more.

11. Penal Law §35.30 governs the circumstances under which police officers and others can use deadly force. But §35.30 is only one provision among many in Article 35 of the Penal Law. Other provisions address a wide variety of purposeful conduct and the circumstances under which such conduct is justified.

12. For example, may a parent use corporal punishment to discipline his or her child? Penal Law §35.10(i) states that he or she can. Under this court's reasoning, however, all that §35.10 does is protect a parent from criminal prosecution. Could children reaching adulthood, sue their parents by arguing that corporal punishment, no matter how moderate, is never justified? Under this Court's decision they could.

13. May a bus operator prevent passengers who have been vandalizing his bus from leaving the bus in order to transport the vandals to a police station? In *Sindle v. New York City Transit Authority,* 33 N.Y.2d 293, 352 N.Y.S.2d 183 (1973) this Court, confronted with those facts, looked to the provisions of Penal Law §35.10 for an answer. The Court held that under §35.10 the bus operator's actions were privileged; the bus operator would be immune from all liability, criminal *or civil* for taking reasonable steps to maintain order on his bus. Under this Court's decision in *McCummings,* however, *Sindle* is no longer good law.

14. May a physician administer a "recognized form of treatment which he [or she] reasonably perceives necessary in the event of a medical emergency, without facing civil liability"? Again, Penal Law 35.10(5) appears to shield the doctor from any liability, but this Court's decision in the *McCummings* case leaves the matter in great doubt. All that the physician would be assured of is that he would not be criminally prosecuted. *McCummings,* however, would allow a patient to sue the doctor for battery regardless of the provisions of the Penal Law.

15. Perhaps the gravest damage that flows from this Court's decision is that it now places in doubt the circumstances under which a police officer may take *any* police action whether (a) placing someone under arrest, (b) using physical force to overcome a criminal suspect's physical resistance or (c) firing a weapon in order to capture a fleeing felon.

16. Suppose a police officer has probable cause to believe that a person has committed a crime in his presence. May the police officer place that person under arrest without fear of civil liability? Criminal Procedure Law §140.10(1) (b) states that a police officer may make a warrantless arrest when the officer has reasonable cause to believe that the person committed a crime in his presence. It had been commonly assumed that a police officer who arrests someone based on probable cause would remain immune from civil suit. No more. After all, the Criminal Procedure Law, it can be argued, merely establishes the circumstances under which a criminal arrest is valid. It has nothing to say on the civil consequences of such an arrest.

17. Any imaginative attorney can fashion an argument, perhaps employing a balancing test, to persuade a jury that under the facts of a particular case, a police officer should not have physically taken someone into custody. Depending on the severity of the crime, the age of the offender, what the police officer knew about his personal history, a plaintiff's attorney will be now be able to argue in a civil suit that, regardless of the provisions of the Criminal Procedure Law, the police officer should have given the alleged offender a desk appearance ticket.

18. In short, it is no exaggeration to state that, after *McCummings*, police officers would be extremely rash to exercise *any* form of police power. These officers will know that all that stood between themselves and a massive tort judgment was their ability to persuade a jury that they acted "reasonably".

19. Moreover, what are ranking police officials to tell their officers about when they may use force to arrest or capture a suspected lawbreaker? How is a police officer to know when he or she may or may not fire a weapon to capture a fleeing felon? How are police officers to know when they are required to retreat before shooting and when they are permitted to stand their ground (*see* Penal Law §35.15[2] [a][ii]). Certainly, after the *McCummings* decision, police instructors can tell their subordinates very little.

20. By straining to affirm plaintiff's favorable judgment, this Court has undermined the settled expectations of police officials, municipalities and government bodies, the drafters of the Pattern Jury Instructions (see 2 PJI 3:4 pp. 593-98), lawyers and litigants. We respectfully submit that the Court should reconsider its decision to destroy New York's justification scheme.

21. There are other grounds for reversal. The majority affirmed the lower court judgment because it believed that *Garner* did not protect a police officer from a civil suit founded on "common law negligence". Moreover, continued the court, even if *Garner* did apply, the jury could have resolved certain questions of fact against the Authority, justifying the verdict in plaintiff's favor.

22. Aside from the problems with this reasoning pointed out earlier, there is an additional reason why this Court should reconsider its conclusion. On April 9, 1993, four days after the court issued its decision in *McCummings*, the Eighth Circuit in *Krueger v. Fuhr*, ____ F.2d ____, retrievable on Westlaw (tm) at 1953 WL 103033 (8th Cir. 1993), applying *Garner*, granted summary judgment in favor of a police officer who had shot a fleeing criminal suspect in the back. The Eighth Circuit rejected the argument that simply because plaintiff had been shot in the back there were unresolved issues of fact for a jury to decide. As *Krueger* establishes, *Garner* sets out a standard for permissible conduct which shields a police officer from civil liability. Moreover, as *Krueger* and the other cases cited in the Authority's original brief demonstrate, very often a police shooting incident can be disposed of as a matter of law. The Court was wrong to wring the record dry in order to extract a bogus "question of fact" justifying the verdict below.

23. Finally, a word about the other errors the Authority raised in its briefs. The Court's mistaken reference to the theory on which this case was decided—common law negligence—suggests that all the other issue in this case deserves a second look. We respectfully ask the Court to look at the other issues raised below, particularly Point III, and for the reasons outlined therein, order a new trial.

WHEREFORE, defendant-appellant requests that its motion be granted.

Dated: Brooklyn, New York
April 30, 1993

LAWRENCE HEISLER

MEMORANDUM OF LAW

COURT OF APPEALS

STATE OF NEW YORK.

BERNARD MCCUMMINGS,

Plaintiff-Respondent,

against

NEW YORK CITY TRANSIT AUTHORITY,

Defendant-Appellant.

The NEW YORK CITY TRANSIT AUTHORITY submits this memorandum of law in support of the Authority's motion for reargument of the court's memorandum decision of April 5, 1993.

PRELIMINARY STATEMENT

In its April 5th memorandum, the majority concluded that this case was submitted to the jury on a theory of "common law negligence". The court also concluded that the provisions of Article 35 of the Penal Law merely addressed the question of criminal culpability. A police officer privileged to act under Article 35 remained immune from criminal

prosecution; but the same police officer might have to answer in damages if his actions were challenged in a tort suit.

The court also believed that the Supreme Court's decision in *Tennessee v. Garner*, 471 U.S. 1 (1985) did not shield the Authority from tort liability under "common law negligence" principles. Finally, the court concluded that even under *Garner* and the Penal Law there were still factual issues which if the jury resolved against the Authority, justified the verdict in plaintiff's favor.

As we briefly outline in this Memorandum, the court's decision is wrong on every count. To begin with, the court's conclusion that this lawsuit was submitted on a theory of common law negligence borders on the bizarre. As the annexed table demonstrates, both parties agreed that the outcome of this lawsuit hinged on the meaning of the Penal Law and *Tennessee v. Garner*. That was the only theory submitted to the jury; that was the only theory outlined in the parties' requests to charge; and that was the only theory on which the case was decided.

Had common law negligence played any role in the suit below the case would have been tried in an entirely different manner. The Authority would have asked the court to submit to the jury the issue of plaintiff's "comparative negligence". The Authority would have argued that under this court's decision in *Barker v. Kallash*, 63 N.Y.2d 19, 479 N.Y.S.2d 201 (1984), plaintiff was barred from recovery as a matter of law; and the Authority would have moved to set aside the verdict since plaintiff did not produce expert testimony about what generally-accepted police practice allowed a police officer to do when pursuing a violent fleeing felon.

The notion that common law negligence played any role in this suit is flawed in another respect. To speak of common law negligence in the factual context of this lawsuit is to

speak conceptual nonsense. Bernard McCummings was not hit by a stray bullet, accidentally discharged from Transit Officer Rodriguez' gun. All parties agreed that Rodriguez intentionally and volitionally shot McCummings, differing solely on the question of whether Rodriguez was justified in so doing. Under these facts it would have been error to submit common law negligence to the jury, even had any of the parties suggested it.[1]

The court's conclusion that the Penal Law justification privileges are irrelevant in the context of a civil suit overturns decades of case law and undermines large portions of the PJI. All Appellate Courts, including this one, have repeatedly held that the justification privileges contained in Article 35 do more than address an actor's criminal culpability. By concluding that the Penal Law privileges are irrelevant in a civil context, this court has assured that a prudent police officer will hesitate long and hard before taking any police action, whether it be making an arrest, using physical force, or firing a weapon. That police officer will know that if a jury, years down the road, concludes that he or she acted "unreasonably", he or she stands exposed to substantial tort damages. As outlined in greater detail below, the court's decision will produce chaos in what had heretofore been a well settled area of the law.

The Court also concluded that even if the Penal Law and *Garner* applied, there were still question of facts that could have been resolved against the Authority. Four days after the court reached its *McCummings* decision, the Eighth Circuit in *Krueger v. Fuhr*, ____ F.2d ____, retrievable on Westlaw (tm) at 1993 WL 103033 (8th Cir. 1993), delivered a decision that shows how wrong this court was. In *Krueger* the court granted summary judgment to a municipality

[1]Applying negligence standards to this suit is like saying that Rodriguez shot McCummings "accidentally on purpose".

whose police officer had shot a fleeing felon in the back. The *Krueger* decision demonstrates why police criminal encounters can often be disposed of as a matter of law. We respectfully submit that, if viewed fairly, the evidence here can only lead to one conclusion: that Police Officer Rodriguez was justified in using his gun rather than let McCummings and his cohorts escape.

Finally, the Authority directs the court's attention to the other points raised in its brief. As we believe we have demonstrated, the court's conclusion that this lawsuit was tried on common law negligence grounds demonstrates that perhaps this court did not fully grasp some of the issues in this suit. The points we raised were not trivial; they perverted the trial process. For all these reasons we respectfully request that the court reconsider its earlier decision.

ARGUMENT

POINT I

THE ONLY THEORIES OF LIABILITY AT TRIAL WERE PENAL LAW §35.30 AND *TENNESSEE v. GARNER*; COMMON NEGLIGENCE WAS NOT CHARGED TO THE JURY. MOREOVER, NEW YORK LAW DOES NOT RECOGNIZE THE EXISTENCE OF "NEGLIGENT BATTERY".

This Court has inexplicably reviewed a trial which never occurred. At the genuine trial, the jury was *never* charged on negligence principles. *Instead, it was repeatedly told, at the instance of both parties, that Tennessee v. Garner, 471 U.S. 1 (1985) and New York Penal Law §35.30 were to govern its decision.* Under the circumstances, it is this Court's respon-

sibility to grant reargument and to issue an opinion based upon the trial as it actually happened.

Both plaintiff (1680, 2085-86; see also 2079-82) and defendant (1689, 1690, 1909-10) sought at trial to have *Tennessee v. Garner*, 471 U.S. 1 (1985) charged as the governing law of the case. The trial court, agreeing to so charge, (1667-70, 1679-80, 1687), told the jury it must apply the law as set by "the United States Supreme Court" (1890, see 1890-93) and included in the charge direct quotes from the Supreme Court's decision (see 1890-93, and Tables, hereinbelow).

Both sides and the trial judge, further, agreed that §35.30 of the Penal Law was applicable in this civil action (706, 1667-70, 1679-80, 1687, 1689, 1696, 1890-93, 1909-10, 1917-21, 1922-23).[2] Defendant sought to have the statute charged to the jury (1689, 1696, 1909-10, 1917-18); plaintiff argued that the statute would have applied but for the alleged circumstance that it was unconstitutional because "the Supreme Court of the United States in that case *[Tennessee v. Garner]* ruled that any statute that permits anyone to shoot a fleeing felon that is unarmed is unconstitutional and not enforced in this country" (706; see also 2086). In line with this, plaintiff's counsel sought a jury charge that Penal Law §35.30 was unconstitutional to the extent that it authorized the use of deadly force against a "suspect who poses no immediate threat to the officer and no threat to others" (1667; see also 2086). *While that was refused, portions of Penal Law §35.30 were included in the jury charge (1893-94).*[3]

[2]The trial judge commented "I believe that my instructions on the law covered both the Penal Law §35.30 and the Supreme Court decisions" (1910, see also 1893, 1918).

[3]See, further, 695-715 for the consensus at trial that *Garner* as well as Penal Law §35.30, barring an alleged Constitutional infirmity, applied.

Thus, plaintiff, defendant and the trial court were in complete agreement that *Tennessee v. Garner* had to guide the jury's determination. Both parties also agreed that §35.30 of the Penal Law was applicable, though plaintiff made the caveat that, to the extent it was in conflict with the *Garner* decision, it was unconstitutional and should not be applied.

THE ONLY STANDARDS REQUESTED TO BE CHARGED TO THE JURY, AND THE ONLY STANDARDS IN FACT CHARGED, WERE THOSE SET FORTH IN *TENNESSEE v. GARNER* AND PENAL LAW §35.30. No negligence charge was sought; no negligence charge was given.

The trial court could not have made it clearer to the jury that they were to apply *Tennessee v. Garner* and Penal Law §35.30: "In other words what I am saying is if you believe the plaintiff's claim you will then consider the penal law of the State of New York and the United States Supreme Court decision which applies to that finding" (1893). The jury was confused but nevertheless understood that they were supposed to apply *Garner* or §35.30. They sent a note while deliberating, seeking guidance on "law on use of deadly force, Penal Code 35.30 of the Supreme Court" (1919).

If this Court is correct in stating that this is a negligence case (see Slip Opinion at pp. 2, 5), then a new trial is in order so that the case can be decided by a jury instructed in such elements of negligence as proximate cause, foreseeability and defendant's culpable conduct. That, however, is not the proper course herein.

The parties, "charted their course" at the trial below. They were in complete agreement that *Garner* and §35.30 were the only underlying sources for the standards to be charged to the jury. The parties having charted this course, the Court of Appeals cannot, at this point in time, hold that

neither plaintiff nor defendant sought the correct standard of law. *Neither can this Court properly affirm on the basis of a theory never charged to the jury.* Instead, this Court must review the charge to see whether it accurately did what both sides and the judge agreed it should do: give the jury the standards set by the United States Supreme Court in *Tennessee v. Garner* and by Penal Law §35.30.

In *Martin v. City of Cohoes*, 37 N.Y.2d 162, 371 N.Y.S.2d 687 (1975): plaintiff allegedly had been injured due to a defective condition on a public sidewalk. At trial the City of Cohoes and plaintiff both relied upon an ordinance requiring simply that the City have actual notice of a defective condition. After the verdict the City argued that the ordinance had been amended so that actual notice was not sufficient; written notice was required. This Court affirmed the refusal of the lower courts' to set aside the verdict. "[P]arties to a civil litigation, in the absence of a strong countervailing public policy, may consent, formally or by their conduct, to the law to be applied. The case before us was tried from the very beginning on the theory of actual notice with the acquiescence if not, indeed, at the formal request, of the city." 37 N.Y.2d at 165 (citations omitted).[4]

"The parties to a lawsuit are free to chart their own course at the trial and may fashion the basis upon which a particular controversy will be resolved." *Cullen v. Naples*, 31 N.Y.2d 818, 819, 339 N.Y.S.2d 464 (1972; citations omitted). "It has long been the law that agreement on a theory of damages at trial, even if only implied, must con-

[4]Plaintiff sought in his trial memorandum of law to have the case governed by *Tennessee v. Garner*, which he termed "the controlling case" (2079). Both sides requested *Garner* be charged and the jury was instructed to "consider the Penal Law of the State of New York and the United States Supreme Court decision which applies to that finding" (1893).

trol on appeal." *T.W. Oil, Inc. v. Consolidated Edison Company of New York, Inc.*, 57 N.Y.2d 574, 587, 457 N.Y.S.2d 458 (1982). In light of "the decision by opposing parties to a civil case to chart their own litigation course, . . . unless public policy is affronted, the law ordinarily raises no obstacle." *Id.* at 580.

> We have repeatedly held that, unless public policy is affronted, parties to a civil dispute are free to chart their own litigation course. *(T. W. Oil v. Consolidated Edison Co.*, 57 N.Y.2d 574, 579-80; *Rector, Church Wardens & Vestrymen of St. Bartholomews' Church v. Committee to Preserve St. Bartholomew's Church*, 56 N.Y.2d 71, 76; *Martin v. City of Cohoes*, 37 N.Y.2d 162, 165). They may 'fashion the basis upon which a particular controversy will be resolved' (*Cullen v. Naples*, 31 N.Y.2d 818, 820). And in doing so '[t]hey may stipulate away statutory and even constitutional rights'. (*Matter of New York, Lackawanna and Western R.R. Co.*, 98 N.Y. 447, 453). *Mitchell v. New York Hospital*, 61 N.Y.2d 208, 214, 473 N.Y.S.2d 148 (1984).

See also *Havas v. Victory Paper Stock Co., Inc.*, 49 N.Y.2d 381, 426 N.Y.S.2d 233 (1980).

Both sides insisted at trial that *Tennessee v. Garner* was the governing law. Further, it was agreed that, leaving aside plaintiff's allegation of possible Constitutional infirmity, §35.30 of the Penal Law also set applicable standards. Plaintiff's request for a *Tennessee v. Garner* instruction, and the fact that plaintiff objected to §35.30 only insofar as it allegedly was in conflict with *Garner* means that this Court cannot review the verdict below based upon standards which were not before the jury. See *Barry v. Manglass*, 55

N.Y.2d 803, 447 N.Y.S.2d 423 (1981); *Derdarian v. Felix Contracting Corp.*, 51 N.Y.2d 308, 434 N.Y.S.2d 166 (1980). Instead, this Court must review, as it has not yet done, the standards which *were* before the jury and which the parties intended to apply. *Caruso v. Ward*, 72 N.Y.2d 432, 534 N.Y.S.2d 142 (1988).

This Court's majority opinion, in effect, credits the trial jury with telepathic powers. The jury was never charged on negligence principles. It was never told that it must determine simply, as this Court would have it, whether Officer Rodriguez' use of deadly force was reasonable under the circumstances. Instead, it was told, with the acquiescence of both parties, that the law it must apply was that set forth in *Tennessee v. Garner* and §35.30. It is impossible to truly conclude the jury reached its verdict based upon a theory not before it and that it necessarily ignored the only theories of liability purportedly before it: those set forth in *Tennessee v. Garner* and §35.30 of the Penal Law.

This Court has a responsibility it has not yet fulfilled. The trial judge thought his charge accurately gave the jury the controlling law as set forth in *Tennessee v. Garner* and §35.30. This Court, in simple justice, must review the charge in this light, to see whether or not it did what the trial judge and both parties sought for it to do.

The charge requests and the charge

That all parties and the trial court thought that Penal Law §35.30 and *Garner* were the standards the jury had to follow is made very clear by the record.

So far as plaintiff was concerned, the only theory that should have been before the jury was that expressed in the Supreme Court's decision of *Tennessee v. Garner*. Thus, in his trial memorandum submitted to the court below, plain-

tiff's counsel stated: "The controlling case in situations involving the use of deadly force to apprehend unarmed fleeing felons is *Tennessee v. Garner*, 471 U.S. 1, 105 S.Ct. 1694 (1985)" (2079).

Plaintiff reaffirmed his commitment to the theory that only *Garner* should be charged to the jury in "Plaintiff's Request to Charge". After requesting the boilerplate charge of PJI 1:22 he went on to seek the following charge:

> Apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment of the United States Constitution. *Tennessee v. Garner*, 105 S.Ct. 1694 (1985) at p. 1699, 471 U.S. 1; *Davis v. Little*, 854 F.2d 605 (2nd Cir. 1988); *Heath v. Henning*, 854 F.2d 6 (2nd Cir. 1988). (2085)

Both *Davis v. Little* and *Heath v. Henning* interpret and apply *Tennessee v. Garner* in a civil rights context. Plaintiff then went on in his request:

> 3. Reasonableness is to be determined by balancing the infringement to the individual's interest caused by the police action against the governmental interest served by that action. *Martin v. Malhoyt*, 830 F.2d 237, 261 (D.C. Cir. 1987); *United States v. Place*, 462 U.S. 696, 703, 103 S.Ct. 2637, 2642 (1983). (2085)

Continuing his *Garner* analysis of the case, plaintiff's request continued:

> 4. The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is

> constitutionally unreasonable. It is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. It is no doubt unfortunate when a suspect who is in sight escapes, but the fact that the police arrive a little late or are a little slower afoot does not always justify killing the suspect. The New York statute, Penal Law §30.30, is unconstitutional insofar as it may be interpreted to authorize the use of deadly force against such fleeing suspect.
>
> (2085-86)

Almost all of the preceding paragraph, starting with "the use of deadly force" and ending with "killing the suspect" is an exact quote from *Tennessee v. Garner* (see 471 U.S. at 11). The last sentence is virtually a quote, simply substituting Penal Law §35.30 for "The Tennessee statute" and altering the syntax slightly.

Having raised §35.30 of the Penal Law in his request, plaintiff went on to explain the application he would give to it:

> It is not, however, unconstitutional on its face. Where the officer has probable cause to believe that the suspect poses a threat of serious physical injury, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical injury, deadly force may be used if necessary to

> prevent escape, and if, where feasible, some warning has been given. As applied in some circumstances, the New York statute would pass constitutional muster. *Tennessee v. Garner, supra* (at 1701); *Davis v. Little, supra; Heath v. Henning, supra.* (2086)

Once again, all of the above paragraph is a quote from *Tennessee v. Garner.* See 471 U.S. at 11-12.

Plaintiff's Request "5" was the definition of "serious physical injury" contained in §10 of the Penal Law (2086). Request 6 (2087) directed the jury to find for the Authority if they found that McCummings *and Wise* had lunged at the officer and put him in imminent fear of death or serious physical injury. "On the other hand, if you find that Police Officer Rodriguez fired his weapon at Bernard McCummings while he was fleeing after having committed a robbery and that one of the bullets struck him in the spine at the bottom of the steps (PL-6) that he was unarmed and posed no significant threat of death or serious physical injury to either police officers Rodriguez or Mead or to a third person, then you must find in favor of the plaintiff."

Plaintiff's final request, Request "7", was that the jury might conclude that if Rodriguez was lying about McCummings and Wise lunging at him they might conclude that this was "a cover up story" which indicated a "consciousness of guilt" (2087).

Thus, the theory of liability which plaintiff wished to present to the jury was that contained in *Tennessee v. Garner.* This was also made crystal clear in the charge conference (*see* 1665-1709). Defendant also sought to have the case determined under *Garner* (*Id.*, see also 958-66, 1657, 1661-63, 1909-10, 1958-60), and sought to have language from the decision and the statute read to the jury (1909-10,

1917, 1922-23) as the Court had promised would be done (1659, 1679; *see also* 1659).

The court's charge itself is a rather garbled version of the law as set forth by Penal Law §35.30 and *Tennessee v. Garner* (see esp. 1890-96). It starts off its explanation of the law by stating "generally under the law it is held by the United States Supreme Court the use of deadly physical force by a police officer is unreasonable and unjustified if it is merely intended to prevent the felon from fleeing from a crime and who poses no immediate threat of serious physical injury or harm to an officer or others" (1890).

The trial justice then went on to insist that both *Garner* and Penal Law §35.30 applied:

> However, in this case under the law as held by the United States Supreme Court decision and under the New York State Penal Law §35.30 a police officer may use deadly force to prevent the scape [*sic*] of any criminal offender or suspect if the police officer reasonably believes that a person committed or attempted to commit any type of criminal offense, felony or otherwise, but the suspect is armed with a firearm or deadly weapon, or if it is necessary for the police officer to defend itself [*sic*] or herself or another person, from what the police officer reasonably believes to be the use or imminent use of deadly physical force or from the threat of serious physical harm against him or her as a police officer or another person. Such use of deadly force by a police officer under these circumstances would be justified under the law. (1890-91)

The charge itself is full of muddled but recognizable versions of the language of Penal Law §35.30, the *Garner*

decision, and plaintiff's request for a charge on *Garner*, as the following tables show:

(Tables are printed herein, *supra*, at pp. 96a to 102a.)

No one at the trial below thought that a charge had been given intending to set a standard other than those set by Penal Law §35.30 and Tennessee v. Garner, though the Authority took the position that the standards set by those two sources had been muddled in the jury instructions.

This Court needs to review those instructions to see whether they did what the trial judge intended and guided the jury's discretion by the sole light of *Tennessee v. Garner* and Penal Law §35.30.

The plaintiff's request has been extensively quoted above. The defendant repeatedly requested that Penal Law §35.30 and a paragraph from *Tennessee v. Garner* be read to the jury as the applicable standards (1909-10, 1917-18, 1922-23; see also 1957-58). The trial judge in the pre-charge conference indicated that he would do this (1659, 1679; see 1667, 1687).

Certainly the jury thought that it was applying Penal Law §35.30 and/or *Tennessee v. Garner*. It requested the court to instruct it on the "law on the use of deadly force by Penal Law §35.30 of the Supreme Court" (1919, and see, similarly, 1921). The court refused the Authority request, made after these jury notes, to read §35.30 and *Garner* to the jury (1917-18, 1922-23). It was the court's position that it had given the essence of §35.30 and *Garner* in the instructions that it had already given and merely reread them (1917-23).

Two points cannot be reiterated too often: (1) no negligence charge was sought or given to the jury below; (2) both sides requested that *Garner* be charged to the jury and agreed that §35.30 of the Penal Law was applicable on its

face, although plaintiff argued that it was unconstitutional to the extent it conflicted with the *Garner* standard.

The verdict sheet sent into the jury asked only one question on liability: "Did Police Officer Manuel Rodriguez use deadly force unjustifiably on June 28, 1984 against the plaintiff Bernard McCummings?" (2088) Justification, and justification as defined in Article 35 of the Penal Law, was the only true question before the jury below. If this case were, in fact, a negligence case, then surely, at the very least, the jury should have been instructed to consider McCummings' culpable conduct in creating the situation in which he got shot in the first place. The point is that this was *not* a negligence case. It was—at least so far as the trial judge, the parties, and the jury were concerned—a case which involved *Tennessee v. Garner* and Penal Law §35.30 *and virtually nothing else.*

There are only two possibilities before this Court: (a) It's decision was correct insofar as it has held that neither §35.30 of the Penal Law nor *Tennessee v. Garner* created a standard which should have been applied by the jury below. If this is the case, a new trial must be had so that the proper standard may be charged to the jury. (b) Since all the parties involved in this case sought and received a charge which set standards explicitly derived from §35.30 of the Penal Law and *Tennessee v. Garner,* this Court, regardless of their applicability or inapplicability outside this case, must review the charge in light of *Garner* and §35.30 to see if it accurately reflected the standards set by them. This, it is submitted, the Court has not yet done but must do if justice is to be served.

The inconsistent and unfair treatment the Authority has received in the First Department and in the Court of Appeals

The Authority has received inconsistent treatment on this issue. The Appellate Division, refusing to consider the Authority's argument that *Garner* should not be applied retroactively, held that *Garner* must be applied as the parties had effectively charted their own course.[5] In fact, the Appellate Division's opinion has since been cited, in conjunction with such decisions as *Martin v. City of Cohoes*, 37 N.Y.2d 162, 371 N.Y.S.2d 687 (1985), to support the proposition that as Appellate Court will not review an alleged charge error to which neither party objected. See: *Schwartz v. Cross Bay Excavators, Inc.*, ____ A.D.2d ____, ____ N.Y.S.2d N.Y.L.J., 4/16/93, p. 33, col.1-2 (2nd Dept. 1993).

In stark contrast, this Court has chosen to ignore the fact, amply illustrated above, that *Tennessee v. Garner* was deemed applicable by plaintiff, defendant and the trial justice at the trial of this action. Instead, it has analyzed this case as though a charge had been sought or given, as it never was, on *negligence*.

Thus, the Authority could not have its arguments *against* the application of *Garner*, as fundamental error, heard in the First Department because it had charted its own course, in conjunction with plaintiff, at trial. In the Court of Appeals,

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[5] "[S]ince defense counsel not only did not object to reliance upon *Tennessee v. Garner, supra*, but acknowledged that *Garner* is both controlling and retroactively applicable, defendant may not for the first time before this Court endeavor to disclaim the relevance and applicability of *Garner*." *McCummings v. NYCTA*, 177 A.D.2d 24, 27, 580 N.Y.S.2d 933 (1st Dept. 1992).

it cannot have its arguments heard as to the proper interpretation of *Garner*, as if no course had been agreed upon at trial. This is inherently unjust. For all intents and purposes, the Authority has been denied the appellate review which it is the duty of this Court to provide. The Court of Appeals should rectify its error and review this case and the law charged to the jury as controlling: *Tennessee v. Garner* and Penal Law §35.30.[6]

Common law negligence

The majority's assertion that the suit was decided on principles of common law negligence runs into other problems as well. The case could not have been decided on negligence principles because negligence principles are utterly out of place in a lawsuit founded on an intentional shooting.

Recall, that at least at trial[7] plaintiff never accused Officer Rodriguez of carelessly discharging his gun. Rather, plaintiff claimed that Rodriguez shot him intentionally in order to prevent him from escaping.

Nor did the Authority try to defend Rodriguez' action by arguing that the officer's gun went off accidentally. The Authority admitted that Rodriguez shot plaintiff inten-

[6]This Court, as well, should review the gross, persistent, and objected-to misconduct of plaintiff's counsel. A case in which counsel referred to a police officer as "Dirty Harry" (1785) and invited the jury to dip into the defendant's "deep pockets" (1789) where it would find "billions" (1789) demands a new trial. See, 160, 202-03, 205, 210, 211, 217-18, 264-65, 267-68, 277-81, 284, 285, 345, 358, 469, 542, 543-44, 1776, 1781-82, 1789, 1799-1800, 1808, 1820, 1831, 1834, 1860, 1958.

[7]Earlier, plaintiff had sworn that he was the victim of an accidental shooting and that he had nothing to do with robbing and mugging Mr. Sandusky (939-40). At trial plaintiff changed his tune.

tionally but argued that he had the right to do so. To speak of negligence, common law or otherwise, in the factual contents of this lawsuit is to speak of nonsense.

As a leading text on the law of torts states: "There is properly speaking, no such thing as negligent assault". *Prosser and Keeton on Torts*, §10, p. 46.

Indeed, once the evidence established that the gist of plaintiff's claim was founded on an intentional tort such as battery, it would have been error for the trial court to allow plaintiff to recover on a theory of negligence. *See e.g. Murray v. Long Island Railroad Co.*, 35 A.D.2d 579, 313 N.Y.S.2d 610 (2nd Dept. 1970), aff'd 28 N.Y.2d 849, 322 N.Y.S.2d 248 (1971). *See also Trott v. Merit Department Stores*, 106 A.D.2d 158, 484 N.Y.S.2d 827 (1st Dept. 1985) assault action governed by one year intentional torts statute of limitations not three year negligence statute. *Cf. also Rafferty v. Ogden Memorial Hospital*, 140 A.D.2d 911, 528 N.Y.S.2d 729 (3rd Dept. 1988); *cf. Panzella v. Burns*, 169 A.D.2d 824, 825, 565 N.Y.S.2d 194 (2nd Dept. 1991), "it is well established that once intentional offensive contact has been established, the actor is liable for assault and not negligence".

Had this lawsuit been tried on negligence principles, an entirely different array of issues would have been presented to the jury. For example, the Authority might have asked the jury to consider McCummings' "comparative negligence" in arriving at its verdict. The Authority might also have asked the trial court to consider whether plaintiff, the victim of a negligent "shooting" should have been barred from seeking to recover from damages arising from his criminal misconduct. See *Barker v. Kallash*, 63 N.Y.2d 19, 479 N.Y.S.2d 201 (1984).

In short, both factually and conceptually "negligent battery" did not and could not play any part in this lawsuit.

In straining to uphold plaintiff's judgment, the Court has done more than just reach the wrong result in a single lawsuit. By importing into the territory of intentional tort, principles of negligence law, the court has blurred the distinction which had heretofore existed between intentional and unintentional torts. It has succeeded in throwing into confusion a large area of tort law. For there are many distinctions between a suit founded on negligence as opposed to one founded on a claim of intentional misconduct.

The measure of damages may differ (*cf. Sharapata v. Town of Islip*, 56 N.Y.2d 332 [1982]);

the statute of limitations may differ (*see* CPLR 214, 215);

the nature of the proof a plaintiff must offer to prevail may differ;

or at the least they used to until this Court's decision in *McCummings v. New York City Transit Authority.*

Nor does the case the majority relied on, *Flamer v. City of Yonkers*, 309 N.Y. 114 (1955), establish that New York recognized a cause of action for "negligent battery". In *Flamer* defense counsel *never challenged* plaintiff's claim that he had been negligently assaulted and battered; defendant never questioned the existence of a negligent battery cause of action. Since defendant acquiesced in the theory of negligent battery which plaintiff submitted to the jury, defendant was bound by the course of conduct he charted. *Flamer*, then, does not establish that New York recognizes a negligent battery claim.

Nevertheless, *Flamer* is indeed relevant, although not for the reasons the majority thought. *Flamer* establishes that where the parties to a suit chart their own course by agreeing to have their suits tried under a particular theory, this court will respect their decision no matter how flawed their understanding of the law.

In our case, both parties agreed to have this lawsuit turn on questions of statutory and constitutional interpretation, i.e., the meaning and applicability of *Garner* and the Penal Law. If the court held the parties to a course they charted in *Flamer*, endorsing the existence of a spurious cause of action for negligent battery, it should certainly honor the course the parties chartered here. It should recognize that the parties agreed to have their case decided under *Garner* and the Penal Law.

POINT II

THE PRIVILEGES CONTAINED IN *GARNER* AND THE PENAL LAW APPLY TO CIVIL TORT SUITS AS WELL.

The Court's conclusion that Penal Law Article 35 does not apply in the context of a civil lawsuit is wrong on the law, wrong on history, and wrong on policy. It clashes with this Court's own decisions, the decisions of every Appellate Court in this State, as well as the law summarized in the Pattern Jury Instructions.

Only 20 years ago in *Sindle v. New York City Transit Authority*, 33 N.Y.2d 293, 352 N.Y.S.2d 183 (1973) this Court explicitly held that the privileges contained in Penal Law Article 35 were equally applicable to intentional conduct which gave rise to a civil lawsuit. In *Sindle*, the infant plaintiff had been riding on board a bus along with other students. The students had gotten rowdy and had begun vandalizing the bus. The driver of the Transit Authority bus locked the doors and announced that he would keep them shut and drive the vandals to a local police station. At some point on the way to the station the infant plaintiff jumped off the bus, sustaining serious injuries.

Plaintiff eventually sued the New York City Transit Authority, accusing it of falsely imprisoning the infant plaintiff. During the course of the trial the Transit Authority moved to amend its answer to plead the affirmative defense of justification outlined in Penal Law 35. In a nutshell, 35.10(3) allows a person responsible for the maintenance of order on a bus to use physical when and to the extent he or she reasonably believes necessary to maintain order. The Authority argued that if it were allowed to plead and prove the defense, it could persuade the jury that its bus driver's action in shutting the bus doors was justified; it could defeat plaintiff's cause of action for false arrest.

This court agreed. It held that it was an abuse of discretion for the lower court to deny the Authority's motion. The court specifically held that the defense contained in Penal Law §35.10, if established, would defeat plaintiff's civil tort suit:

> In view of our determination, it would be well to outline some of the considerations relevant to the issue of justification. In this regard, we note that, generally, restraint or detention, reasonable under the circumstances and in time and manner, imposed for the purpose of preventing another from inflicting personal injuries or interfering with or damaging real or personal property in one's lawful possession or custody is not unlawful. (Cf. Penal Law, §§35.20, 35.25; see, also, General Business Law, §218, which affords a retail merchant a defense to an action for false arrest and false imprisonment where a suspected shoplifter is reasonably detained for investigation or questioning.) Also, a parent, guardian or teacher entrusted with the care or supervision of a child may use physical force reasonably necessary to

maintain discipline or promote the welfare of the child. (Penal Law, §35.10) *Sindle v. New York City Transit Authority*, 33 N.Y.2d 293, 297, 332 N.Y.S.2d 183 (1973)

Sindle broke no new ground; it followed an unbroken line of case law which had consistently held that the provisions of the Penal Law applied to civil as well as criminal cases. Thus, the cases cited in our Reply Brief on page 12 specifically:

Petri v. Milhim, 139 A.D.2d 652, 653, 527 N.Y.S.2d 291 (2nd Dept. 1988)

Santos v. City of New York, 135 A.D.2d 426, 430, 522 N.Y.S.2d 538 (1st Dept. 1987)

Frazier v. State of New York, 64 N.Y.2d 802, 486 N.Y.S.2d 919 (1985)

Arnold v. State of New York, 108 A.D.2d 1021, 486 N.Y.S.2d 94 (3rd Dept. 1985)

Cook v. City of New York, 82 A.D.2d 72, 441 N.Y.S.2d 104 (2nd Dept. 1981)

Herring v. City of Syracuse, 63 A.D.2d 833, 406 N.Y.S.2d 409 (4th Dept. 1978)

Stein v. State of New York, 53 A.D.2d 988, 385 N.Y.S.2d 874 (3rd Dept. 1976).

all establish that a police officer or any actor who acts in accordance with Penal Law privileges not only enjoys immunity from criminal prosecution, but from a civil damage suit as well. The Pattern Jury Instructions embodying the prevailing trend of New York case law also endorses this view. *See e.g.* 2 PJI 3:4 pp.596-98, 2 PJI 3:4 supp. 20-24. The commentary to 2 PJI 3:4 begins by explicitly noting that its summary of the law is based on Penal Law §35.30. *See also Jacobs v. State of New York*, N.Y.L.J., 3/1/91, p. 23 (Ct. Claims, 1991).

The leading national text on torts also concludes that a state's penal law sets the bounds for permissible police conduct even in the arena of a civil suit. "The courts have generally adopted the same [justification] policy concerning civil litigation the state legislatures have in defining crime." *Prosser & Keeton on Torts*, §19 p. 127.

Indeed this Court although not as explicitly as it did in *Sindle*, has often recognized that the Penal Law privileges protect a defendant from liability in civil tort suit.

Only 14 years before *Sindle*, this Court in *Fields v. City of New York*, 4 N.Y.2d 334, 175 N.Y.S.2d 27 (1958) applied the provision of the then applicable, Penal Law §1055, to determine whether a police officer would be liable in civil damages for firing his weapon to capture what he believed to be was an escaping criminal.

The court quoted with approval from an early *criminal* case, *Conraddy v. People*, 5 Parker Cr.R. 234, where a police officer faced criminal charges for firing a weapon at a fleeing criminal, and concluded that the criminal law privileges applied parameters of permissible police conduct to *civil* suits as well.

The *Fields* court also relied on an American Law Reports annotation to determine under what circumstances a police officer would be *civilly* liable for firing a weapon. The title

of the Article—"Criminal Law: Criminal Responsibility of Peace Officers For Killing Or Wounding One Who They Wished To Investigate or Identify" . . . 18 ALR 1369, did not dissuade the court from applying its conclusions to a civil tort suit.

Other Court of Appeals cases have also concluded that the Penal Law privileges apply to civil suits as well. In *Magar v. Hammond,* 183 N.Y. 387 (1906) plaintiff, a trespasser, was shot by defendant's watchman who spotted him poaching fish, a misdemeanor. In outlining the circumstances that would justify liability, the court referred to (then) Penal Code 209, and 223. It noted that even a police officer would not be privileged to shoot a criminal who was fleeing from the commission of a misdemeanor. The implication in *Hagar* was plain. Had plaintiff been guilty of a felony, the defendant could rely on the Penal Code privilege to defeat the civil suit.

Even earlier in *Burns v. Erben,* 40 N.Y. 463 (1869), this Court in dealing with a defendant's *civil* liability for false arrest looked for guidance to the criminal law (*see Burns* at p. 468). "The writers upon *criminal* law and the reported cases, so far as I have examined them, hold uniform language."

Not only this court but federal courts sitting in New York (see *Heath v. Henning,* 854 F.2d 6 [2nd Cir. 1988]), and even the United States Supreme Court in *Garner* looked to Article 35 of the Penal Law when a police officer was privileged to use force and escape civil liability (471 U.S. at 17, fn.18 and accompanying text).

New York courts have looked not only to the Penal Law, they have also looked to the Criminal Procedure Law provisions in deciding whether a police officer could be civilly liable for placing a person under arrest. CPL §140.10 allows a police officer to make a warrantless arrest if a crime was

committed in the officer's presence. This court and others have routinely held that an officer who arrests a person based on such probable cause cannot be sued in tort no longer (*see e.g. Broughton v. State of New York*, 37 N.Y.2d 451, 456, 373 N.Y.S.2d 87 [1975]). Applying this Court's reasoning here, all that the Criminal Procedure Law addresses is the question of whether a particular arrest is valid for criminal law purposes. Tort law, according to this reasoning, presents a different matter. Thus, if a plaintiff is able to persuade a civil jury that a police officer, instead of arresting him should have given him a desk appearance ticket, that plaintiff should be able to prevail.

The sharp line this Court drew between the Penal Law privileges and those governing tort actions should be rejected not only because it clashes with case law, it should be rejected because it also rests on historically flawed premises. The majority believed that the privileges contained in Article 35 address entirely different interests than those at stake in civil suit. History proves this view wrong.

Many of the Penal Law privileges simply restate or are similar to the old common law tort privileges that New York courts had traditionally applied to civil as well as criminal actions. For example, Penal Law 35.10(3) cited in the *Sindle* case allows a person in charge of a carrier to use reasonable force to maintain order on a bus or a train. §35.10 is drawn from its earlier codified predecessors, specifically §246(5) of the Penal Law of 1906 and §223(5) of the Penal Code of 1886. These provisions did nothing more than restate the earlier tort rule, which had immunized the operator of a carrier from civil liability for using force to maintain order on a bus or a train (*see e.g. Hibbard v. N.Y. R.R. Co.*, 15 N.Y. 455, 464 [1857]; *Higgins v. Watervliet Turnpike Co.*, 46 N.Y. 23 [1871]; *see also Pease v. Delaware, C. & W. R. Co.*, 101 N.Y. 367, 371 (1885).

A parent and teacher's right to use physical force to discipline a child, as codified in present Penal Law §35.10(l) and its predecessor (*see* PL 246[41]); *Penal Code* 223(4) are also restatements of the old common law tort rule (*see e.g. Starr v. Litchfield*, 40 Barb 541, 543-44 (Kings Gen. Term 1863).

The fleeing felon rule embodied in modified form Penal Law §35.30 is itself similar to the old common law tort rule. The predecessors of Penal Law §35.30 (*see* PL 1055[3]1, Penal Code §204[31]) allowed a police officer to use deadly force to capture a fleeing felon no matter what the felony, so long as the escaping felon was actually guilty for the felony. *See* 1906 Penal Law 1055(3), 1886 Penal Code §204(3). As this court recognized in *Fields v. City of New York, supra*, the justifiable homicide defense outlined in Penal Law §1055(3) was identical to the privilege that would immunize a police officer in a *civil* suit. *Fields*, 4 N.Y.2d at 339.

Other evidence also establishes that the criminal and tort privileges governing the use of force never differed. Old Penal Law §246(3) allowed a person to use reasonable force against a trespasser who was attempting to seize his property. Once again, these penal provisions drew from the well of common law tort principles (*see e.g. Gyre v. Culver*, 47 Barb 592, 593 [1867])

> The law does not oblige the owner of property to stand idly by and see a thief or trespasser take his property

Thus, the dichotomy this court understood to exist between the Penal Law privileges and those applicable to civil suits is a spurious one. The Penal Law embodies the same privilege which should apply to tort suits since the Penal Law privilege is itself derived from or identical to old common law tort privileges.

In the face of historical evidence and the overwhelming weight of case law, the unanswered question remains: why did this Court suddenly decide to render inapplicable the Penal Law privileges which had always been thought to apply to civil tort suits, too? Part of the answer may lie in the court's confused understanding of this suit as founded on "common law negligence". As a general proposition, courts are reluctant to apply black letter rules of law to simple negligence actions. *See Prosser and Keeton on Torts*, §34, p. 217-18.

The facts of a particular accident, whether a slip and fall down a staircase, or an intersection collision, vary so greatly that any black-letter rule of law would tend to be riddled with too many exceptions to prove useful. Then, too, the focus in negligence law is *retrospective*. A jury evaluates a defendant's past actions, applying hindsight, appraising the facts of a particular accident against the general standard of reasonable care.

An entirely different state of affairs applies to tort suits founded on intentional and purposeful conduct, such as police activity. Because such conduct is purposeful and often predictable, detailed rules of law such as those embodied in the Penal Law tend to prove more useful in judging whether particular conduct was justified or lawful.

Moreover, a detailed set of guidelines such as those embodied in the Penal Law serves an additional function. It allows police departments and municipalities to know in advance what conduct the legislature has determined is

permissible and which is not. Put another way, an important purpose of detailed provisions such as those contained in the Penal Law is to allow police and other officials to plan police action *prospectively*.

A detailed guide such as the one contained in Article 35 of the Penal Law is important for another reason. The question of when a police officer may use physical force is fraught with considerations of public policy. It is important that the legislature have the final word on what is or is not proper police conduct. Take the facts underlying this lawsuit for example, and assume for the moment that there is no question that Officer Rodriguez had reason to believe that unless he fired his weapon, McCummings would have escaped. May a police officer use force under such circumstances? There are strong reasons to argue that he may; admittedly, too, there are grounds, weaker ones, for arguing that a police officer should never fire a weapon except to defend himself or another.

Both positions are "reasonable" in the sense that one can offer more or less compelling arguments in support of either of them. But what is patently unreasonable is to allow a civil jury to decide these questions on an *ad hoc* basis, based solely on its own idiosyncratic view of what is or is not reasonable. What is patently unreasonable is for a Bronx jury to decide one day that it is unreasonable for a police officer to fire a weapon to capture a fleeing felon, while a Westchester jury, on another decides that it is. Such inconsistent results will inevitably flow from this court's simplistic conclusion that juries, unguided by the clear directives of the Penal Law, can now apply simple negligence standards to determine whether an officer acted reasonably.

The effect of this Court's
decision will be far reaching

The majority undoubtedly thought that it was addressing only the narrow question of whether and when a police officer could use deadly force to capture a fleeing felon. The effect of the majority's memorandum, however, will be substantially more far reaching. No longer able to rely on the clear directives of the Penal Law, ranking police officials will now be able to tell their officers nothing more instructive than that they must act "reasonably".

Police officers on the beat will follow one of two courses. The more prudent ones will hesitate to take any police action, whether it be firing a weapon, making an arrest or using simple physical force. These officers know that, if years later a civil jury concludes that the officers acted unreasonably, they could be held to answer in substantial damages. Other officers may take the opposite approach. Unguided by the clear language of the Penal Law, these officers will use their own judgment to decide what is reasonable, engaging in conduct that may pass the bounds of permissible police conduct.

Nor will this court's decision affect only police officers and officials; trial judges will also find themselves in a difficult quandary. Faced with this Court's decision tossing out large portions of the Pattern Jury Instructions, these judges will be left with the chore of crafting a new common law of justification. As the threshold of the 21st century, with guns and violence commonplace in major metropolitan areas, trial courts will now be given the chore of constructing from scratch an entirely new common law of tort justification.

Nor are the effects of the *McCummings* decision limited to police action. Article 35 covers a vast spectrum of intentional and purposeful activity. May a parent use corporal punishment to discipline his or her child (PL §35.10[1])? May a physician render emergency treatment to an uncon-

scious patient (PL §35.10[5])? May a bus driver use physical force to eject an unruly passenger (PL §35.10[3])? May a civilian facing a burglar in his home stand his ground and use deadly force to repel the intruder or must he retreat (PL §35.15[2][a][i])? For decades, lawyers and judges and the drafters of the Pattern Jury Instructions had believed that the answers to these questions were clearly and definitively set forth in Article 35 of the Penal Law. No more.

We respectfully request that the court reconsider its earlier pronouncement and declare as the law of the State of New York what it had been for decades: that the justification provisions of the Penal Law apply to civil as well as criminal cases.

POINT III

PURSUANT TO THE LAW WHICH PLAINTIFF, DEFENDANT AND THE TRIAL COURT AGREED APPLIED, THE ACTION SHOULD HAVE BEEN DISMISSED AS A MATTER OF LAW.

As has been shown at length above, both sides requested that the jury be instructed to apply *Tennessee v. Garner*, 471 U.S. 1 (1985) in reaching its verdict, and the trial court purportedly so charged. Accordingly, this case cannot be disposed of until the effect of the Supreme Court's holding in *Garner* has been fully considered. It is respectfully submitted that under *Garner*, which both sides agreed was the controlling law, plaintiff's action should have been dismissed.

It is worth noting, initially, that *Tennessee v. Garner* does not require an analysis essentially different from Penal Law §35.30 which, as shown above, has for many decades, been the controlling law in cases involving allegations of civil assault. See *Heath v. Henning*, 854 F.2d 6 (2nd Cir. 1988).

That law, also charged to the jury as setting the controlling standard for determining the Authority's liability or lack thereof, obviously called for the dismissal of the action.

Returning to *Garner*, it is illuminating to examine the very recent Eighth Circuit decision of *Krueger v. Fuhr*, ____ F.2d ____, retrievable on Westlaw (tm) at 1993 WL 103033 (8th Cir. 1993). In that case, a Missouri police officer was found entitled to summary judgment pursuant to *Tennessee v. Garner*. The officer, at the time of the incident forming the basis for the action, had been pursuing a suspect who, he had been informed by radio, had committed an assault while armed with a knife. When the officer spotted Krueger, he did not have a knife in his hand, nor did the officer see any knife on his person. Despite the officer's command to "freeze", the suspect fled. The officer testified that he heard Krueger pull an object from his waistband area and then saw a knife gripped in Krueger's fist. The police officer shot Krueger; two bullets struck him in the back and a third at the base of the skull, causing his death. Subsequently, a knife with an exposed blade was discovered 43 feet away from the point where Krueger had been shot.

The Circuit Court of Appeals applied *Garner* in determining the summary judgment motion:

> "The use of deadly force is constitutionally reasonable in certain limited circumstances. 'Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may

> be used if necessary to prevent escape, and if, where feasible, some warning has been given.' *Garner*, 471 U.S. at 11-12."

The Eighth Circuit, applying the gloss given to *Garner* by *Graham v. Connor*, 490 U.S. 386 (1989) noted that "an officer's compliance with the standard must be assessed from the point of view of a reasonable officer on the scene". The officer knew that someone fitting Krueger's description had committed an armed assault. It was objectively reasonable for him to believe "that the individual he was chasing had committed a crime involving the infliction or threatened infliction of serious physical harm". The Circuit Court did not find that the circumstance that the knife was discovered 43 feet from the body or that Krueger was struck in the back created genuine issues of fact. "Officer Fuhr maintains, and we agree, that these facts are not material to a determination of whether the shooting was objectively reasonable."

> Plaintiffs misapprehended the nature of the Fourth Amendment's reasonableness inquiry. Reasonableness must be determined from the point of view of a reasonable officer in the situation, 'rather than with the 20/20 vision of hindsight'. *Graham*, 490 U.S. 396. An erroneous perception or belief does not violate the Fourth Amendment if such perception or belief is objectionably reasonable. *Id.* We have already concluded that Fuhr's belief that he was facing an armed and dangerous suspect was objectively reasonable. Therefore, even assuming that plaintiffs were able to establish that Krueger was unarmed at the time of the shooting, that fact would not preclude entry of judgment for Officer Fuhr.

The court also noted that "it is not remarkable that an escaping felony suspect was shot in the back".

Continuing its *Garner* analysis, the Court next determined that the use of deadly force was necessary to prevent escape. Krueger was fleeing at the time of the shooting and, even though other police officers were in the general area, the Fourth Amendment did not require Officer Fuhr to eschew deadly force which the court finds "was necessary to prevent escape in accordance with the standards enunciated in *Garner*".

The court lastly considered the *Garner* requirement that a warning be given, where feasible".

> Officer Fuhr ordered Krueger to freeze when he first encountered Krueger lying between two cars in East Walnut Street, and several times during the pursuit. There is no evidence that he gave warning immediately prior to the shooting. However, we are satisfied that under the urgent circumstances facing Officer Fuhr, the absence of a warning immediately preceding the shooting does not render his use of deadly force constitutionally unreasonable.

See also: *Daniels v. Terrell*, 783 F.Supp. 1211 (E.D.Mo. 1992); *Ramos Ayala v. Diaz Martinez*, 707 F.Supp. 75 (D.P.R. 1988); *Hill v. Jenkins*, 620 F.Supp. 272 (N.D. Ill. 1985).

Officer Rodriguez' shooting of McCummings was objectionably reasonable under *Garner*. As both sides agreed that *Garner* set the governing standard, the action should have been dismissed before the prolix and confusing charge was given to the jury.

This Court's assumption that there were "issues of fact" for the jury to determine is erroneous. A genuine review of

the evidence at trial reveals that no rational jury could have concluded that Officer Rodriguez did not correctly realize that Sandusky had been the victim of a violent felony and that McCummings was one of the fleeing perpetrators. Once again, the Court is urged to look at the *actual record* and not rely on plaintiff's self-serving and grossly inaccurate recounting of events.

POINT IV

THE COURT SHOULD RECONSIDER THE OTHER POINTS THE AUTHORITY RAISED IN ITS MAIN BRIEF AND ORDER A NEW TRIAL.

This memo has shown that the majority, in its haste to affirm the judgment in plaintiff's favor, may have overlooked important and critical aspects of this case. By characterizing this suit as one founded on negligence, the majority demonstrated that it misread crucial portions of the record.

With this in mind, the Authority respectfully asks the Court to re-examine the other points raised in our briefs, specifically Points II to IV in which the Authority asked for a new trial.

Point III, we submit, deserves a close second reading. The Court will recall that plaintiff accused Officers Mead and Rodriguez of covering up their misdeeds in an earlier stop and frisk and also accused them of confronting the stop and frisk suspects as well as McCummings solely because the officers were motivated by racism.

The Authority's objection to these insinuations was exceptionally well preserved and cannot be sloughed off as harmless. To begin with, the jury, during its deliberations, asked the court to allow it to review copies of the stop and

frisk memos (1922). Then, too, one can hardly imagine a more damaging charge than the charge of racism that plaintiff's counsel levelled against the Authority.

These improprieties are far more serious than the ones this Court condemned in *DiMichel v. South Buffalo Railway Co.*, 80 N.Y.2d 184, 590 N.Y.S.2d 1 (1992) and *Badr v. Hogan*, 75 N.Y.2d 629, 555 N.Y.S.2d 249 (1990), cases in which this Court granted new trials. For these reasons we respectfully request that the Court reconsider its earlier decision and grant a new trial.

CONCLUSION

The Court should reconsider its affirmance of the judgment in plaintiff's favor, dismiss the suit or order a new trial.

Dated: Brooklyn, New York
April 30, 1993

Respectfully submitted,

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APPENDIX M—Verdict Sheet.

SUPREME COURT, NEW YORK COUNTY
IAS PART 23

BERNARD MCCUMMINGS,

Plaintiff,

against

NEW YORK CITY TRANSIT AUTHORITY,

Defendant.

Index No. 9494/85

Justice Leonard N. Cohen

VERDICT SHEET

In order to constitute a verdict as to each answer, at least five (5) jurors must agree to the answers to each question although all jurors should participate in all deliberations.

The answer to each question need not be by the same five (5) jurors.

1. Did Police Officer Manuel Rodriguez use deadly force unjustifiably on June 28, 1984 against the plaintiff Bernard McCummings?

(At least any *five* jurors must agree on the answer to this question)

Yes √ 6-0

If Yes, proceed to Question 2.

If No, end your deliberations and go no further.

2. Separately state the full total dollar amount of damages for which the plaintiff, Bernard McCummings, is entitled to recover against the defendant Transit Authority as to *each* of the following *items* of damages.

(At least any *five* jurors must agree on the *answers* to *each* of the following items of damages)

a) Pain and suffering from June 28, 1984 to date.

$500,000. 6-0

b) Future pain and suffering including the permanent effect of the injuries.

$2.0 million 6-0

c) Future medical supplies and equipment.

$622,142.55 6-0

d) Future nursing and other home care services.

$1,220,000 6-0

(If none as to any of the above, state none)

APPENDIX N—Colloquy Re: "Negligence".

(1694) THE COURT: What interrogatories are you requesting?

MR. KUZMACK: I would request a question as to whether they found that the officer was lunged at and fired as a result of that.

THE COURT: What else?

MR. KUZMACK: Whether they found that the plaintiff was at the bottom of stairway PL-6; and that the officer fired from the landing, as he attempted to escape.

THE COURT: And what? Attempted to escape?

MR. KUZMACK: And that he fired as he attempted to escape.

THE COURT: All right.

MR. SIERADZKI: Those are the two factual issues.

* * *

(1695) THE COURT: I will deny that request and put it to the jury just as we do in any negligence case: Was the defendant negligent in the operation or (1696) control over the motor vehicle?

We don't go into the details. I don't think it's warranted here.

* * *

APPENDIX O—Respondent's Notice of Claim.

IN THE MATTER OF THE CLAIM OF

BERNARD MCCUMMINGS

against

THE NEW YORK CITY TRANSIT AUTHORITY and THE NEW YORK CITY TRANSIT POLICE

TO: The New York City Transit Authority and The New York City Transit Police.

PLEASE TAKE NOTICE that the undersigned claimant(s) hereby make(s) claim and demand against the New York City Transit Police as follows:

1. The name and post-office address of each claimant and claimant's attorney is:

Claimant (*pro se*): Bernard McCummings, 1212 Great Avenue, Apartment 5B, Bronx, New York

2. The nature of the claim: On or about June 28, 1984, Claimant was shot twice in the body by a police officer or transit police officer of the City of New York. This shooting resulted in permanent paralysis of the Claimant's lower limbs. On or about that same date, Claimant was fasely

arrested. Thereafter, his constitutional and civil rights were violated. He was phychologically and physically abused, he was defamed, he was illegally imprisoned for a period of many days, maliciously prosecuted and forced to be present in Court, even though the City of New York and the Transit Police Authority knew that there was no merit to the continuance of the prosecution and that such prosecution was malicious and the imprisonment illegal.

* * *

APPENDIX P—Description of Victim's Condition by Transit Detective Carrera.

(382) Carrera—by Plaintiff—Direct

Q. Mr. Breitbart:

Now, in addition to interviewing Mr. Sandusky, he was very angry at my client in a yes or no?

Det. Carrera: He was angry. He was also very traumatized.

* * *

APPENDIX Q—Description of Victim's Condition by Transit Captain Kelly.

(424) Captain Kelly:

A. Well, there were actually four, if you include the complainant. But, as far as I understood from the complainant, he was choked almost to unconsciousness, so he essentially wasn't there, or at least wasn't conscious.

A. I think I put in there that he said he doesn't remember because he was semi unconscious from the strangling. That's what I understand. Can I see my report?

Q. Certainly. I think it is right in front of you.

(Handed)

Q. In addition to your report, did you review all available information to you at the (425) time you issued your report?

A. He indicated being near unconscious from the stranglehold on his neck and was unclear as to the officer's action or the shots. It's in the endorsement in the fourth paragraph down. So, you have the officer—

* * *

(436) THE WITNESS: The officer. Like I said, there is only three people there who know what happened, at least from what they tell me. The complainant is semi-unconscious, okay and he is bleeding, by the way. He is a 71 year old man, feisty little bastard.

Oh, you met him? I said the same thing, "God bless you."

* * *

APPENDIX R—Excerpt From Petitioner's Trial Summation.

(1673) The plaintiff is going to claim that there is a cover up in this case, that because the shooting wasn't justified all of the cops got together and decided they would cover it up to save one officer.

I ask you to listen very carefully to the Judge when he charges the law to you because even if this occurred the way the plaintiff says it did with Mr. McCummings being shot in the back at the bottom of PL6 rather than at the landing, under the law as you will hear it from the Judge, Mr. Rodriguez, Officer Rodrigues was justified in shooting.

There was no reason for a cover up. He was justified either way.

* * *

APPENDIX S—Respondent's Brief in *Flamer v. City of Yonkers.*

To be argued by
J. Raymond Hannon

Court of Appeals

OF THE STATE OF NEW YORK

Amanda Flamer, as Administratrix of the Goods, Chattels and Credits of Thomas Franklin Wilson, Deceased,
Plaintiff-Appellant,

against

The City of Yonkers, Allison Hopper and Frank Porach,
Defendants-Respondents.

RESPONDENTS' BRIEF

Statement.

This is an appeal from an order of unanimous affirmance entered on the 24th day of May, 1954, in the office of the Clerk of the Appellate Division of the Supreme Court, Second Department, and the judgment entered thereon in the office of the Clerk of Westchester County on the 7th day of June, 1954, which order and judgment unanimously affirmed a final judgment of the Supreme Court, Westchester County, entered in the office of the Clerk of the County of Westchester in favor of the defendants and against the plaintiff in an action brought by the administratrix of the estate of Thomas Franklin Wilson, deceased, to recover for the alleged wrongful death of said deceased. The amended complaint (fols. 16-37)

sets forth three causes of action, the first for alleged negligence on the part of the defendants in using more force than was necessary to make an arrest and in handling of a firearm; the second for an alleged assault upon the deceased and the third for alleged negligence of the defendant City of Yonkers in retaining the defendants Hopper and Porach as members of the Police Force and permitting said defendants to carry a gun. In the third cause of action plaintiff alleges that the defendant City of Yonkers had knowledge or could have acquired knowledge of the viciousness of the defendants Hopper and Porach.

Defendants' answer (fols. 40-57) admits that, at the time and place referred to in the amended complaint, the defendants Allison Hopper and Frank Porach were in the course of their employment with the defendant, The City of Yonkers, and that the defendant Hopper then and there shot plaintiff's intestate with a lethal weapon resulting in his death; that a purported notice of claim was served within sixty days of the occurrence; that more than ninety days elapsed since the presentation of said alleged claim; that no settlement or adjustment of the said alleged claim was made and that the action was commenced within one year from the date of said occurrence, and denies each and every other allegation contained in paragraphs numbered "5", "6", "7", "8", "9", "10", "11", "13", "14", "15", "16", "17", "18", "19", "20" and "21" of the amended complaint. As a separate and complete defense to the allegations contained in the first, second and third causes of action, defendants allege that any injuries sustained and suffered by or causing the death of plaintiff's intestate were caused in whole or in part or were contributed to by the negligence and want of care of the plaintiff's intestate and not by any negligence or want

of care on the part of defendants or any of them (fols. 46-47); that, at the time and place mentioned in the amended complaint, plaintiff's intestate was in a fight with and assaulting an unidentified person in breach of the peace (fol. 51); that the defendants, Allison Hopper and Frank Porach, in the course of their employment as police officers of the City of Yonkers, in order to preserve and restore peace, ordered said plaintiff's intestate to stop said fight and assault and laid their hands upon him as they lawfully might using no more force than was necessary for said purpose (fols. 51-52); that thereupon plaintiff's intestate first assaulted the defendant Porach and assaulted and threatened further to assault the defendants Hopper and Porach, whereupon said defendant Hopper necessarily committed in self defense and in defense of the defendant Porach the acts set forth in the amended complaint (fols. 52-53), and that any injuries sustained and suffered by or causing the death of the plaintiff's intestate were caused in whole or in part or were contributed to by the negligence and want of care of plaintiff's intestate and not by any negligence or want of care on the part of the defendant, The City of Yonkers (fols. 55-56).

On April 21st, 1952, this action came on for trial before Mr. Justice Doscher and a jury at a trial term of the Supreme Court, Westchester County. At the conclusion of plaintiff's case, with the exception of the testimony of Dr. Spain, defendants, by their attorney, moved to dismiss the third cause of action on the ground that plaintiff had failed to prove the allegations of said cause of action (fol. 555) which motion was granted by the Court (fol. 558). The Court, at the close of plaintiff's case, reserved decision on defendants' motion to dismiss the first cause of action (fols. 1198-1204) and denied defendants'

motion to dismiss the second cause of action (fols. 1204-1205). At the close of the case the Court granted defendants' motion to dismiss the first cause of action (fol. 1541), denied defendants' motion to dismiss the second cause of action (fol. 1542), and submitted to the jury the second cause of action the jury returning a 10-2 verdict for the defendants (fols. 1618-1619).

Facts.

On August 26th, 1949, plaintiff's intestate, Thomas Franklin Wilson, and his nephew, Harold Flamer, met at about 9:30 P. M. at Flamer's house (fol. 120), and, after visiting four different grills or bars (fols. 122, 131-134) and the house of a lady (fol. 135) and drinking beer, about eight beers apiece (fol. 144), went to the Columbia Bar and Grill on New Main Street, Yonkers, between twelve-thirty and one o'clock (fols. 79-80). Flamer testified that they started wrestling and that the bouncers told them to break it up (fols. 82-84, 147, 164). At the request of the bouncer (fols. 161-164) and the head bartender (fol. 564) Eugene Fernandez, the other bartender, called the police (fols. 664-665). After Fernandez called the police Wilson said "Go ahead and call the cops again, no cop in Yonkers takes me out of here alive" (fol. 676).

Before the arrival of the police there was a fight (fol. 665) and on their arrival the police broke up the fight and held Wilson (fols. 665-666, 736-750) who put up a fight making it necessary for one of the policemen to hit him (fol. 666). Wilson snatched the nightstick away from one of the policemen and hit him alongside of his head (fols. 283, 306-310) knocking him down (fols. 903-907, 954-955, 959-961). The other police officer, Hopper, told Wilson to drop the stick

(fols. 907-908, 1062). Wilson was coming at Hopper holding the stick up above his head (fol. 1064). Wilson took three lunges at Hopper (fol. 1346) and was in the process of striking Hopper with the night stick when Hopper shot him (fol. 1452). Prior to the shooting Hopper told Wilson to put the stick down. Instead of complying Wilson made a lunge. Hopper backed up and Wilson came after him the second time and Hopper told him to "put the stick down or I will give it to you" (fols. 1241-1242). Upon Wilson's failure to comply Hopper pulled his gun and shot him (fol. 1242).

POINT I.

Defendants were not required to point out the material allegations not proven by the evidence in moving to dismiss the first cause of action.

Plaintiff's first cause of action was for negligence the plaintiff alleging use of excessive force in making an arrest and the negligent handling of a firearm resulting in the death of plaintiff's intestate (fols. 21-23).

At the conclusion of plaintiff's case, defendants, by their attorney, moved to dismiss the first cause of action on the ground that the plaintiff had failed to prove that cause of action against the defendants, there being no evidence in support of the allegations of negligence and no proof of any arrest (fols. 1198-1199). The Court reserved decision on the motion (fols. 1203-1204). At the close of the case the Court granted defendants' motion to dismiss the first cause of action (fol. 1541).

Plaintiff-appellant urges in Point II of her brief that on a motion to dismiss at end of plaintiff's

case, defendant must point out the particular material allegations not proven by the evidence.

In a negligence action, a motion to dismiss on the ground that no negligence has been shown is sufficiently specific, it is not necessary to go into details to show why the defendant claims that no negligence has been shown, or in what particular respect the plaintiff has failed in his proof.

Byrnes v. *N. Y., L. E. & W. R. R. Co.*, 113 N. Y. 251;
Carmody-Wait Cyclopedia of New York Practice, Vol. 6, page 698.

When the plaintiff has put in his evidence such evidence may not sustain the allegations of a cause of action and, under such circumstances, a motion to dimiss such a cause of action should be granted.

Collelli v. *Turner*, 154 App. Div. 218, affd. 215 N. Y. 675;
Carmody-Wait Cyclopedia of New York Practice, Vol. 6, page 697.

Where plaintiff's evidence is equally consistent with the absence as with the existence of negligence a motion to dismiss may properly be granted, and the case should not be submitted to the jury since, in such a case, the evidence fails to establish an essential fact, and a *prima facie* case has not been made out.

Fearick v. *Lehigh Valley Railroad Co.*, 210 App. Div. 742, 747.

In reserving decision on the motion to dismiss the first cause of action at the conclusion of plaintiff's case, the Court, at Trial Term stated "I will reserve decision because I'd like to check on that matter a little further".

It is respectfully submitted that plaintiff failed to prove the first cause of action and that the Court properly granted defendants' motion to dismiss said cause of action.

POINT II.

Plaintiff's third cause of action was properly dismissed.

In her third cause of action plaintiff alleges that the defendant, City of Yonkers, was negligent in that it knew of the vicious propensities of the defendants Allison Hopper and Frank Porach and despite such knowledge failed to remove them from the Force and the said defendant, City of Yonkers, was further negligent in that it retained said police officers upon the Police Force of the City of Yonkers knowing that the said police officers were incompetent and ill-tempered persons; and the said defendant, City of Yonkers, was further negligent in that knowing of said viciousness of the said officers it, or its representatives, officers or agents, permitted and allowed said police officers to carry a lethal weapon, to wit, a gun and that the said defendant, City of Yonkers, was further negligent in that, upon a reasonable inspection or investigation, it could have acquired knowledge of the viciousness of said police officers (fols. 33-36).

No testimony was offered by plaintiff to prove the aforementioned allegations and, at the conclusion of plaintiff's case, with the exception of the testimony of Dr. Spain, defendants, by their attorney, moved to dismiss this cause of action on the ground that plaintiff had failed to prove the allegations of said cause of action (fol. 555) which motion was granted by the Court (fol. 558).

The failure of plaintiff to prove the allegations of this cause of action warranted the granting of defendants' motion to dismiss said cause of action.

CONCLUSION.

The judgment and order should be affirmed with costs.

Respectfully submitted,

J. Raymond Hannon,
Corporation Counsel,
Attorney for Defendants-Respondents,
Office & P. O. Address,
City Hall,
Yonkers, N. Y.

APPENDIX T—Excerpt From N.Y. Pattern Jury Instruction §3:3.

b. Battery

(1) Generally

PJI 3:3. Intentional Torts—Interference with Person or Property —Battery—Generally

One who in a (hostile, offensive) manner touches the person of another, without his consent and with the intention of causing (harmful, offensive) bodily contact to (such other, a third person), commits a battery and is liable for all damages resulting from his act.

Plaintiff claims that defendant *([describe act, such as:—]* struck him in the face, fracturing his jaw). Defendant *([state claim, such as:—]* admits that he struck plaintiff, but defendant says that he did not do so intentionally but while hysterical).

Intent involves the state of mind with which an act is done. It means the desire to bring about a result. If a person acts voluntarily with the desire to bring about a result, he is said to have intended that result. Further, although he has no desire to bring about the result, if he does the act under circumstances known to him which make it substantially certain that the result will follow, he is also said to have intended the result.

If you find that defendant voluntarily *([describe act:]* struck plaintiff in the face) and that he intended to cause (harmful, offensive) contact to plaintiff, you will find that defendant committed a battery. If you find that defendant did not voluntarily *([describe act:]* strike plaintiff in the face) or that while he did so, he did not intend to cause (harmful, offensive) contact to plaintiff, you will find that defendant committed no battery.

Comment

Based on Masters v Becker, 22 AD2d 118, 254 NYS2d 633; Clayton v Keeler, 18 Misc 488, 42 NYS 1051; see Schloendorff v Society of New York Hospital, 211 NY 125, 105 NE 92; Noonan v Luther, 206 NY 105, 99 NE 178; and see generally Prosser & Keeton, Torts (5th Ed) 39, § 9; 1 Harper & James, The Law of Torts, 211, §§ 3.1–3.3; Restatement, Second, Torts §§ 13–20; 6 NY Jur 2d 191, Assault-Civil Aspects. Battery differs from assault in that battery requires actual contact, whereas assault does not, see Comment, PJI 3:2, supra, Supp.

Since the same act may constitute battery or negligence depending upon whether or not it was intentional, Jones v Kent, 35 AD2d 622, 312 NYS2d 728, it will often be necessary to submit both issues to the jury, Flamer v Yonkers, 309 NY 114, 127 NE 838, although there cannot be recovery for both, Murray v Long I. R. R. Co. 35 AD2d 579, 313 NYS2d 610, affd 28 NY2d 849, 322 NYS2d 248, 271 NE2d 227; Rafferty v Arnot Ogden Memorial Hospital, 140 AD2d 911, 528 NYS2d 729. However, if the only inference that may be drawn from plaintiff's evidence is that defendant's contact with plaintiff was intentional, plaintiff may recover only in battery and the issue of negligence should not be submitted to the jury, Mazzaferro v Albany Motel Enterprises, Inc., 127 AD2d 874, 515 NYS2d 681; see Panzella v Burns, 169 AD2d 824, 565 NYS2d 194.

APPENDIX U—Respondent's Summons and Complaint.

Summons

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

BERNARD MCCUMMINGS,

Plaintiff

against

NEW YORK CITY TRANSIT AUTHORITY,

Defendant

Plaintiff designates New York County as the place of trial.

The basis of the venue is PLACE OF OCCURRENCE.

Plaintiff resides at 1212 Grant Avenue, Bronx, New York, County of Bronx.

To the above named Defendant

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer, or, if the com-

plaint is not served with this summons, to serve a notice of appearance, on the Plaintiff's Attorney(s) within 20 days after the service of this summons, exclusive of the day of service (or within 30 days after the service is complete if this summons is not personally delivered to you within the State of New York); and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated, New York, New York
May 30, 1985

MORRIS J. EISEN, P.C.,
Attorney(s) for Plaintiff

Post Office Address

233 Broadway
New York, New York
(212) 766-8200

Defendant's address:

NEW YORK CITY TRANSIT AUTHORITY
370 Jay Street, Brooklyn, New York

Complaint

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

BERNARD MCCUMMINGS,

Plaintiff,

against

NEW YORK CITY TRANSIT AUTHORITY,

Defendant.

Plaintiff, by his attorney, MORRIS J. EISEN, P.C., for his verified complaint, upon information and belief, respectfully alleges:

FOR A FIRST CAUSE OF ACTION

1. Plaintiff, BERNARD McCUMMINGS, was and still is a resident of the State of New York and resides at 1212 Grant Avenue, Bronx, New York.

2. That at all times hereinafter mentioned, the defendant, NEW YORK CITY TRANSIT AUTHORITY, was and still

is a municipal corporation duly organized and existing under and by virtue of the laws of the State of New York.

3. That on September 26, 1984, the plaintiff served upon the New York City Transit Authority, his Notice of Claim, setting forth the time when, the place where and the manner in which the claim arose; and that said notice of claim was served within ninety days of the date of occurrence herein.

4. That more than thirty days have elapsed since the presentation of said notice of claim, and no adjustment or payment has been made by defendant, NEW YORK CITY TRANSIT AUTHORITY.

5. That at the request of the defendant, NEW YORK CITY TRANSIT AUTHORITY, plaintiff, BERNARD McCUMMINGS, has submitted to an oral examination on May 30, 1985.

6. This action is being commenced within one year of the date of the occurrence herein.

7. That at all times hereinafter mentioned, the defendant, NEW YORK CITY TRANSIT AUTHORITY, maintained an organized police department and police force as a unit and agency of the New York City Transit Authority.

8. That at all times hereinafter mentioned, Manuel Rodriquez, shield number 3454, was an employee of the defendant, NEW YORK CITY TRANSIT AUTHORITY, assigned for duty as a police or other officer with the police department of said defendant.

9. That beginning on or about June 28th, 1984, Manuel Rodriquez, at the times and upon the occasions hereinafter specified, was acting as an employee of the defendant, NEW YORK CITY TRANSIT AUTHORITY, in the course of his employment and the scope of his authority and in furtherance of the interest of his employer, the defendant, NEW YORK CITY TRANSIT AUTHORITY.

10. That on June 28th, 1984, in the vicinity of the subway station located at 96th Street and Central Park West, in the Borough of Manhattan, City and State of New York, BERNARD McCUMMINGS was carelessly and negligently assaulted, battered and shot without justification and under circumstances which did not justify said actions, by police officer Manuel Rodriquez and other unknown New York City Transit Authority police officers.

11. Said occurrence and resulting severe and serious injuries which the plaintiff was caused to suffer, were due solely to the negligence, recklessness and excessive force of the defendant's employees.

12. That as a result of said excessive force, negligence and unlawful conduct, plaintiff was severely and seriously injured, both bodily and mentally.

13. That by reason of the foregoing, the plaintiff has been damaged, through no fault of his own, by the defendant, NEW YORK CITY TRANSIT AUTHORITY, in an amount which exceeds the jurisdictional limits of all lower courts.

FOR A SECOND CAUSE OF ACTION

14. Plaintiff repeats, reiterates and realleges each and every allegation hereinabove contained in paragraphs "1" through "13" inclusive with the same force and effect as if hereinafter set forth at length.

15. That defendant, NEW YORK CITY TRANSIT AUTHORITY, its agents, servants and/or employees, were negligent in the screening, training and supervision of its employees, and failed to take all necessary and proper steps to prevent the aforesaid occurrence; and the defendant was otherwise negligent.

16. That the aforesaid occurrence and resulting severe and serious injuries to the plaintiff occurred without any fault or wrongdoing on his part.

17. That by reason of the foregoing, plaintiff, has been damaged in an amount exceeding the jurisdictional limits of all lower courts.

FOR A THIRD CAUSE OF ACTION

18. Plaintiff repeats, reiterates and realleges each and every allegation hereinabove contained in paragraphs "1" through "17" inclusive with the same force and effect as if hereinafter set forth at length.

19. That the defendant, their agents, servants and/or employees, acted under color of the statutes, ordinances, regulations, customs and usages of the State and City of New York, in their assault, battery and shooting of plaintiff and

their action deprived BERNARD McCUMMINGS of his rights, privileges and immunities secured by the Constitution of the United States of America and the laws thereunder, pursuant to title 42 United States Code §1983.

20. That by reason of the foregoing the plaintiff has been damaged, through no fault of his own, by the defendant, NEW YORK CITY TRANSIT AUTHORITY, in an amount which exceeds the jurisdictional limits of all lower courts.

* * *

APPENDIX V—Excerpt From Respondent's Opening.

(36) And we will show you by charts and measurement that was some 17 or 18 or 20 feet away from where he says shots were fired. And the other ran off down the station with Patrolwoman Christine Mead in pursuit.

* * *

APPENDIX W—Excerpt From Respondent's Trial Testimony.

(937) Q. I direct your attention, Mr. McCummings, to May 30th, 1985 at Greenhaven Correctional Facility, I believe you testified on direct examination that you underwent a statutory hearing, an examination by an attorney representing the Transit Authority, is that correct?

A. Correct.

Q. And you were represented by an attorney named Paul Sclietroma, at that time, is that correct?

A. Correct

Q. And you had a chance to review this document before testifying, is that correct?

(938) A. Correct.

Q. And at that time you took an oath to tell the truth, the same as you did here, is that correct?

A. Correct.

Q. Page 18, were you asked the following question and did you give the following answer?

* * *

Q. Were you asked this question and did you give this answer, line 21:

> "QUESTION: Can you tell us under what (939) circumstances you were shot?
> "ANSWER: Me and my friend was walking out of the train station to the exit and one of my friends grabbed a man and I got shot. I said what are you doing?"
> Do you remember being asked that question and giving that answer?

A. No.

Q. Did you give that answer to that question?

A. No. Excuse me, yes, I did. I had to give that answer if it's there in the book, sure. But, I don't remember it.

* * *

APPENDIX X—Excerpts From Trial.

(1153) *Proceedings*

THE COURT: Let me look at it. And also 32.

MR. KUZMACK: There are two pages of each, your Honor.

MR. BREITBART: Your Honor, this application is being made out of context. If your Honor recalls Captain Doyle was called to testify by the defendant. Several times during the course of the plaintiff's case I attempted to offer the '86 guidelines and your Honor kept them out because of objection by Mr. Kuzmack.

On cross-examination I asked questions of Captain Doyle which lead, during redirect examination of Mr. Kuzmack, to ask Captain Doyle what would you have done using these guidelines. I am talking in words and substance now. It is only at that juncture when he opened the door and placed the new guidelines into evidence in the case by trying to accomplish through the back door what he couldn't accomplish through the front door that I then again on recross asked questions of the captain. It became apparent that the new guidelines were a codification of the case of Garner versus Tennessee, and only at (1154) that time after your Honor indicated that he had asked the question that opened the door to that issue that I offered the guidelines, and they were then admitted. They were not admitted *ab initio*. They were only admitted because he asked the question that opened the door and that question in words or substance was: "Captain Doyle what would you have done using the new guidelines?" And the captain's response, flippantly, was: "I would have found it was a good shooting also."

And it was only at that time that they became relevant to this Court.

MR. KUZMACK: May I finish, your Honor?

THE COURT: Yes.

MR. KUZMACK: I will submit the following two cases to the Court. The first is Crossland versus the New York City Transit Authority 68 New York 2nd 165. I have a copy for the Court as well, your Honor. I would submit under Crossland the Court said the Appellate Division correctly concluded that liability cannot be based upon the alleged breach of (1155) Transit Authority Rule 85 which, as in the portion quoted above, imposed a duty higher than the Authority actually has, i.e. to exercise ordinary care commensurate with the existing circumstances. Indeed the rule would be inadmissible at trial for the same reason.

I will tie this together, your Honor.

THE COURT: One moment. I thought that you had said that Garner applied—was the law that applied to this case as well as the Penal Law. You have said that. Is that not so?

MR. KUZMACK: What I believe I said was that I was not disputing the fact that several cases applied Garner retroactively.

THE COURT: No. I was under the impression that you said that therefore Garner applied to the facts in this case.

MR. KUZMACK: Now, if Garner does apply to the facts in this case, the 1986 regulations impose a higher duty than Garner.

THE COURT: That is not what Doyle testified to. Doyle testified on his cross or recross that 16.0, whatever it is, of the police guidelines rules and regulations of 1986, this is (1156) his testimony, codify the Garner rule as to when a police officer uses deadly force with respect to an unarmed fleeing felon. That's what my notes indicate.

MR. KUZMACK: That, your Honor, I would submit is a captain's interpretation of the law. He is not a trained lawyer.

THE COURT: I understand all of that. But he is an expert in that respect, too, in the sense of several of these police officers testified as experts in the area of when a police officer uses deadly force, and it was his testimony that stated that the '86 rules and regulations codify Garner, which does apply to this case.

MR. KUZMACK: They codified Garner to some degree, your Honor. I don't believe he was referring to the entire two pages. What I would submit to the Court—

THE COURT: I am submitting when deadly force is used by a police officer.

MR. KUZMACK: What I would submit to the Court is even if they codify Garner letter for letter, the rules and regulations that were (1157) in existence in '86 shouldn't be admitted into evidence.

THE COURT: If Garner applies—let me ask Mr. Breitbart. We do have rules and regulations of '82?

MR. BREITBART: That's correct, sir.

THE COURT: Is it your view that the '82 rules and regulations, did they in any way codify Garner?

MR. BREITBART: Of course not. Garner didn't happen until 1985.

THE COURT: So the '82 regulations had a standard which was a little less than Garner.

MR. BREITBART: Garner in it's language, the Supreme Court in Garner, Judge, said that New York has the most stringent requirements in the United States, and that they were using the New York guidelines as a means of making a determination for the entire country. But Garner made unconstitutional every statute and every guideline that did not use a reasonable man standard when interpreting a shooting. They indicated that a shooting was a seizure under the Fourth Amendment and that you had to use the (1158) Fourth Amendment reasonable man standard in making that

determination and it made unconstitutional every statute or guideline in the United States that did not follow that. And subsequent cases, especially in this circuit, have interpreted Garner to be retroactive.

THE COURT: Let me ask you with respect to the '82 rule and regulation, it does mention when deadly physical force is to be used. It does not mention anything as to a fleeing unarmed felon, there is nothing in it about it?

MR. BREITBART: Judge, may I just make one further point?

Not only were you correct about what Mr. Kuzmack said, but he said he is happy that this Court is using Garner, that he wants Garner to be applied to this case and he coincides, he agrees with the plaintiff's counsel that Garner is the law of this case.

THE COURT: I will apply Garner. But all I am saying is the '82 regulation really is not a regulation that deals with the use of deadly force when there is a fleeing felon, forget armed or unarmed. It does say you can use (1159) deadly physical force when any other level of force is insufficient to effect police control of a felony involving physical force or imminent use of physical force against one's self or another. That is not the law as applied to this case.

MR. KUZMACK: And, your Honor, I would submit that the 1986 rules and regulations are not another law either. They are the rules and regulations of the Transit Authority, which may be higher or maybe lower than what the law says.

In this case, I would submit, they are higher than what the law says they have to be, and I would submit that since they are couched in terms that are, in essence, legalese, the jury would be confused if confronted with that, and any charge based on the justification section of the Penal Code 35.30 and/or Garner verses Tennessee.

I have just one more case to quote, your Honor. Caputo versus the New York City Transit Authority. The Court said—the cite, I believe the cite is 86 Appellate Division 2nd 883. The quote, your Honor, is again referring to the Transit Authority rule. It says:

(1160) "Parts of Rule 85 of Transit Authority rules and regulations were improperly submitted to the jury for consideration. The rule is couched in language similar to that of a legal standard and as a matter of law contains provisions which constitute a higher than reasonable standard of care. By submitting the provisions to the jury for consideration the jury may have been confused as to the proper standard notwithstanding the limited instructions as to the rules of applicability."

Your Honor, I would submit that in reading the 1986 rules and regulations in their entirety, not just taking out the sentence, but as of this moment, they are being submitted in their entirety, that it is a higher standard than Garner lays down in it's dicta or it's holding. And it is a higher standard than is given to us in the jurisdiction statute in the Penal Law 35.30.

And I would ask, based on that, on these two rulings by the courts that the plaintiff's—that you reconsider the admission of Plaintiff's 32 and take it out of evidence and (1161) away from the jury at this time.

If I may, your Honor, I will just hand up the two copies of the cases that I read.

THE COURT: I can't say necessarily that the '86 rules and regulations are a higher standard than those of Garner. Or a greater standard. There has been testimony by the police officer who said that the '86 rules codified Garner. Garner is the law that applies to this case. And I don't—you are just saying that it is a greater standard, as a matter of law it is a greater standard. I don't necessarily find that to be the

case. In what way do you say it's a greater standard? It seems to me it is consistent with Garner.

MR. KUZMACK: Your Honor, I will just point out one area.

THE COURT: It may well be their statement that the firearm should be used as a defensive weapon and not a tool of apprehension, well Garner didn't deal with that maybe implicitly. But I think it does state the '86 rules and regulations state that when deadly physical force should not be used to effect the (1162) arrest of a fleeing felon. And it also indicates other conditions that the police officer must meet, or the factors that the police officer must meet before using deadly force. All of which are consistent with Garner.

Were they inconsistent?

MR. KUZMACK: I believe the first inconsistency is under D, your Honor, the statute states that deadly physical force shall not be used unless the officer has probable cause to believe that, and number one is, deadly physical force was used or threatened by the perpetrator.

THE COURT: That is consistent with Garner.

MR. KUZMACK: No, your Honor. I believe Garner says serious physical force was used or threatened by the perpetrator.

THE COURT: Well, deadly physical force is more serious.

MR. KUZMACK: Is a more serious standard.

THE COURT: So Garner had less stringent—

MR. KUZMACK: That is exactly what I am (1163) arguing, your Honor, that the '86 regulations are more stringent than Garner and therefore would mislead the jury into believing that the Transit Authority had the duty to follow their own regulations legally as opposed to departmentally.

THE COURT: I see.

How do you answer that?

MR. BREITBART: It is not even an issue here. The only reason your Honor admitted this at the time you admitted it, is because he opened the door by asking questions how the captain would have applied the '86 guidelines.

How could the jury make a determination on the credibility of that witness and the applicability of the '86 guidelines without having an opportunity to see the '86 guidelines? And that was the issue at the time that your Honor reconsidered and then admitted them into evidence.

As far as the Garner standard is concerned, and as far as the New York Police standard, I don't see that that has any relevance to this argument.

THE COURT: Regardless of what Doyle (1164) said or testified to, what is your view as to whether or not the rules and regulations are of a higher or a greater standard than what Garner requires?

MR. BREITBART: I think he would have to introduce evidence in chief to make that out. He can call an expert to say that. But I don't think there is anything in this record for us to make such a determination. He has already acquiesced that Garner is the law of the case.

THE COURT: The only problem is they do have these rules and regulations in '86, and then I would have to instruct the jury that these rules and regulations were not in effect in 1984 and that the sole purpose of the rule and regulations being admitted into evidence was to determine whether or not Doyle was credible in terms of his testimony.

But as to whether or not the rules and regulations were in effect in 1984, I would have to instruct them that they were not, although they have it in front of them. It would seem to me that the only reason why the rules and regulation was admitted was because of the expert (1165) testimony by Doyle that they codified Garner. Now he may be incorrect and it appears that you may be right.

MR. BREITBART: I have no objection to that, Judge. That is the purpose for which they were offered.

THE COURT: That all it does is test his credibility. But the '86 rules and regulations, at least so far as that Subdivision 16.0 little D-1 does require a higher standard than Garner requires, that's true.

MR. BREITBART: We have no objection to that for charging.

THE COURT: I would have to instruct them that that rule does not apply.

MR. KUZMACK: Your Honor, I would submit that on the basis of the Crossland, the Caputo and Crossland, the instruction may not be enough at the time of giving the instructions. If we got the—first, as to Captain Doyle's attack by Mr. Breitbart on his credibility, I would submit that—withdrawn.

The Crossland and Caputo cases state, basically, your Honor, that even an instruction (1166) limiting the use of these regulations, since they require a higher standard—

THE COURT: You may be right that by admitting it, it may not be sufficiently clear to the jury since they will have had the opportunity to look at that rule and regulation, and they may feel that the officer was to use deadly physical force only if deadly physical force was used and threatened by the perpetrator, and actually that is greater force than just serious physical force.

I think—it would just seem to me that maybe you are right, Mr. Kuzmack, that the rules and regulations shouldn't be an exhibit before the jury because I will not be charging that that is what applies in 1984. I will be charging Garner, and I haven't heard the whole case yet, but I think I have an idea on what the credibility is in terms of the two stories. And the rules and regulations, despite what Doyle said, do

not exactly codify the Garner rule, which I would be charging.

MR. BREITBART: Except he was the teaching officer who was doing what he thought (1167) and teaching what he thought was his understanding, and that was the purpose of cross-examination.

THE COURT: You may be correct. But he was testifying about a 1986 rules and regulations. I don't believe—all I am saying is that may be true, but I will not be charging this rule and regulation being in effect, the '86 one. I don't know by my instructing them to disregard it for purposes of whether that is the law as to when deadly force may be used, I don't know whether such a curative instruction is sufficient, and they have the document in front of them, or could have the document in front of them as well as hearing Police Officer Doyle's testimony.

MR. KUZMACK: I would submit, your Honor, they would be confused afterwards.

THE COURT: I think it would be confusing.

MR. BREITBART: Why don't we redact any part that your Honor feels is inconsistent with Garner.

THE COURT: I can't do that. I can't (1168) give them a rule and regulation of 1986. I would have to interpret this rule and regulation as to it's consistency with Garner.

Aside from that provision which you just read, Mr. Kuzmack, and which I read, are there any other inconsistencies with Garner?

MR. KUZMACK: Yes, your Honor.

B, the firearm shall be viewed as a defensive weapon.

THE COURT: That is true, it is not even referred to in Garner.

MR. BREITBART: Captain Doyle testified that that is the case.

THE COURT: That is his testimony. They have the testimony.

MR. KUZMACK: Everything below the departmental policy prohibits the use of, on page 1 of exhibit 32, is in addition to Garner.

THE COURT: I don't agree with you. Five I think is consistent with Garner.

And so is four. It is directly from Garner.

MR. KUZMACK: Your Honor, I believe taken in their entirety, the entire section says (1169) in addition department policy prohibits—

THE COURT: In addition, that is true. But I would say if you deleted in addition.

MR. KUZMACK: Prohibits the use of deadly physical force unless all of the following factors are present. And I believe if you take four, five, six together you have something that is in excess of the guidelines laid down by Garner.

MR. BREITBART: Judge, we have to keep our eye on the ball here. He opened and has taken the position consistently until we started taking evidence, that the defendant's story is nonsense, that he is defending this case on the basis that the cop was lunged at with arms outstretched, and that the cop was put in imminent fear of deadly physical force being used against him.

THE COURT: I haven't heard, that was may be the opening, but I haven't heard any evidence to that.

MR. BREITBART: The memo book is in. The reports are in. They are all in. That is the theory of defense here. Now to come up with (1170) a specious argument that it's okay to shoot this kid in the back in the bottom of the stairs if you don't believe the cop was lunged at, is not the purpose of a lawsuit, it is disingenuous if that is going to be the argument based upon admissibility. The lines were very, very clearly

drawn. We are saying he was shot in the back at the bottom of the stairs he was saying—

THE COURT: I understand that. That is not what I am dealing with. I have to deal with what the law is, and I will follow Garner, no question about it.

The question also is that the case is going to depend on who they believe, the police officer's version of where he was shot and what the perpetrator did, or they will believe he was shot fleeing down the bottom of the stairs. The jury is going to make that decision.

And if they believe the version that he was shot at the bottom of the stairs, plaintiff is going to recover under Garner. That is the way I see the case. Maybe you will change my mind. If he was shot on the landing as the police officers say, it may be different.

(1171) MR. BREITBART: Judge, can you reserve decision on this until tomorrow? Maybe we can agree on it. But I feel bad after four days that the jury is sitting there for an additional hour.

THE COURT: All right, I will reserve decision.

Are you going to be referring to the '86 rules and regulations?

MR. KUZMACK: Not today.

THE COURT: All right, then I will reserve decision.

Is there anything else?

MR. BREITBART: He tells me there is a videotape.

MR. KUZMACK: We will be offering a videotape, your Honor, this afternoon after a witness testifies. We can show it to your Honor beforehand.

THE COURT: How long is it?

MR. KUZMACK: Ten minutes.

THE COURT: What is it?

MR. KUZMACK: It's a tape taken on February 1st of Bernard McCummings outside, going (1172) out of his house and going around the block.

THE COURT: Have you seen this tape?

MR. BREITBART: No.

THE COURT: Then we will have to play the tape.

MR. BREITBART: Is this the first witness you are going to call this afternoon?

MR. KUZMACK: Yes.

THE COURT: I thought it was about the subway station?

MR. BREITBART: That's what he had told us previously.

MR. KUZMACK: I have tape of the subway station that I am going to be offering later.

THE COURT: Let the record show that a videotape is being shown by the defendant. Perhaps, counsel, you can just in your own comments state what we are seeing. I don't know what we are seeing. I see a railing and a window.

MR. KUZMACK: I believe that is Bernard McCummings behind the fence sitting in his chair outside the house.

MR. BREITBART: Is there any cutting or

* * *

(155)(1646) *Proceedings*

I have an application to make.

THE COURT: Yes, I understand that.

Members of the jury, we are going to recess and we are going to ask that you return here on Wednesday morning, say, about ten o'clock. And during Wednesday, we will have, as I understand it, summations and my instructions to you on the law, and then the case will be submitted to six of you to begin deliberations.

I want the three alternates to also return on Wednesday. We never know what happens. So you are still on this jury and you are to also report, the three alternates plus the six jurors on Wednesday morning at ten o'clock. The case will be submitted to you sometime that day.

In the meantime, do not discuss anything about this case, as I say again, and I am repeating it again, amongst yourselves or with anyone else.

Have a pleasant weekend and I will see you on Wednesday at ten o'clock.

(Jurors leave the courtroom.)

THE COURT: Yes?

MR. BREITBART: Your Honor, my application, at this time, after the evidence that was elicited (156)(1647) during the defendant's case from Sergeant Lennon and from Mr. Rodriguez is to reinstate the second cause of action with regard to training and lack of supervision that was dismissed at the end of the plaintiff's case.

I think we have made out a cause of action with regard to the lack of supervision, with regard to the lack of training, with regard to the appropriate time to fire or not to fire in spite of the fact it wasn't made out according to the Court's judgment at the end of the plaintiff's case.

I would ask the Court to conform those causes of action and submit it to the jury of the proof at the end of the entire case and reinstate that second cause of action.

MR. KUZMACK: I would submit nothing has changed since the ending of plaintiff's case. There has been no testimony elicited by anyone that the training, supervision,—

THE COURT: Lack of training and supervision.

MR. KUZMACK:—that there was any lack of training or supervision.

There was testimony by Sergeant Lennon and, (157)(1648) I believe, Captain Doyle, that there was training, but there was no evidence offered by the plaintiff, or through any witnesses that any of the training or supervision was lacking in any way. There was no standard laid down and no proof of not meeting that standard in either case.

THE COURT: In other words, as I understand it, your position is that there has not been established what standards of training is required, and supervision is required by the Transit Police, or was required by the Transit Police in 1984 and prior to that time—

MR. KUZMACK: And—

THE COURT:—for the use of deadly force.

Is that what you are saying in the use of deadly force?

MR. KUZMACK: Well, in a way, I think—

THE COURT: By the use of a firearm. Put it that way.

MR. KUZMACK: I think what the plaintiff has in evidence are the 1982 rules, and he has got testimony what individual officers did or didn't do in their training. He had no proof of whether that training meets any or fails to (158)(1649) meet any standard put out, no expert coming in and saying there has been a survey of other police forces in 1984 and forty-nine of them reached level A for training and supervision and the Transit Police only reached level E. Therefore, the training and supervision does not meet the standard of care commonly recognized to the practice of police work.

There is no evidence that they didn't meet their own standard of care.

MR. BREITBART: There is evidence, though, that Rodriguez didn't know whether you can shoot or not shoot. He was asked to testify whether or not in 1984 he knew

whether or not you could shoot an unarmed fleeing felon and he was totally ignorant of it.

Now, I don't have to call an expert witness to make out the fact if someone doesn't know whether or not affirmatively or negatively he can't shoot an unarmed fleeing felon, that he was not up to par on the issue, and certainly that the Transit Authority did not properly supervise him so that they would know that he didn't know.

* * *

(165)(1656) *Proceedings*

to any police officer in the Transit Authority for that period of time in the use of deadly force.

MR. KUZMACK: May I just be heard, your Honor?

The second cause of action the plaintiff has written it out in his pleading, "The defendant New York City Transit Authority," Paragraph 15, "its agency, servants and/or employees were negligent in the screening, training and supervision of its employees, and failed to take all necessary and proper steps to prevent the aforesaid occurrence and the defendant was otherwise negligent."

THE COURT: In other words, you are saying based on negligence. The claim is based on negligence. I have not looked—

MR. KUZMACK: That the training and supervision claim is based on negligence, your Honor. There has been no laying out of a standard that was violated.

THE COURT: There has been no evidence presented as to just what the standard would be for the use of deadly force other than what—other then the police guide, the police guideline of '82, the Penal Law 35, and the Federal United States Supreme Court case.

(166)(1657) Now, both plaintiff and defendant have presented to me the fact that all of those guidelines of '82, the Penal Law, all apply to this case.

MR. BREITBART: That is the standard that we are asking you to apply.

THE COURT: And I can't say whether or not based upon that evidence, that standard, as reflected in the statutes, and that Supreme Court decision, there has been any training so far as police officers are concerned in the Transit for the period prior to June 28th and on June 28, 1984.

MR.KUZMACK: I make one distinction, your Honor. On June 28, 1984, there were Transit Police rules in effect.

Now, for purposes of the law of this case, *Tennessee v. Garner* is retroactively applied. But for the purposes of a lack of training and supervision, it cannot be. Because, at the time, they didn't have that in front of them. All they had was for justification 3530 and the T.A. rules.

So, what we are dealing with, as far as the standard goes, is that for the use of deadly force,

* * *

(1664)

SUPREME COURT OF THE STATE OF NEW YORK

NEW YORK COUNTY : CIVIL TERM : PART 23

BERNARD MCCUMMINGS,

Plaintiff,

against

NEW YORK CITY TRANSIT AUTHORITY,

Defendant.

Index #: 9494/85

80 CENTRE STREET
NEW YORK, NEW YORK
FEBRUARY 27, 1990

Before:

HONORABLE LEONARD N. COHEN, Justice and a jury.

Appearances:

Morris J. Eisen, P.C., Attorney for Plaintiff, 60 Hudson Street, New York, New York 10013, By: David Breitbart, Esq., Maurice Sieradzki, Esq., of Counsel

Wallace Gossett, Esq., Attorney for Defendant, 370 Jay Street, Brooklyn, New York 11201, By: Nicholas Kuzmack, Esq., George Sawaya, Esq., of Counsel

PETER D. KAUFMAN, C.S.R.
Official Court Reporter

(2)(1665) *Proceedings*

(The following occurred in the robing room:)

THE COURT: On the record.

I have two documents as Court exhibits—I think there are two or three—plaintiff's requests to charge; that would be one.

(Received and marked as Court's Exhibit II.)

THE COURT: And I have the defendant's requests to charge, as Court Exhibit III.

(Received and marked as Court's Exhibit III.)

THE COURT: With respect to Plaintiff's requests to charge, 1:22—

MR. SIERADZKI: If you disbelieve one part of his testimony, you may disbelieve his entire testimony, Judge.

I think both of us requested that that be charged.

THE COURT: Apprehension by use of deadly force—apprehension by the use of deadly force is subject to the reasonableness requirement of the Fourth Amendment of the United States Constitution, I decline to charge as requested.

I will be charging reasonableness, the basis for finding justification or lack of justification of the shooting, reasonable belief on the (3)(1666) part of the police officer, but I will not be charging or making a reference to the Fourth Amendment of the United States Constitution.

The reason is that I do not believe it's necessary to give the jury an instruction as to the reasoning behind the law that I'm instructing them on, or the basis of the law.

Three, reasonableness is to be determined by balancing an infringement of the individual's interest caused by the police action against the governmental interest served by that action.

I decline to so charge.

I believe that that, too, is the rationale that may be used for the law, which I will be charging, and that is that it's the reasonable belief by the police officer of the totality of the circumstances that confronted him at the time of the shooting and immediately prior to the shooting which governed.

I take it you have exceptions to it?

MR. BREITBART: Of course.

THE COURT: The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable.

(4)(1667) It is not better that all felony suspects die than they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so.

It then goes on and ends—doesn't end, but it goes on to state that the New York State Statute, Penal Law Section 3530 is unconstitutional insofar as it may be interpreted to authorize the use of deadly force against such fleeing suspects.

I'm not prepared to instruct the jury as to that.

In fact, I intend to charge Penal Law Section 3530, in terms of its relevant provisions, as it affects the facts in this case.

I decline to charge as set forth in this request, about the use of deadly force being constitutionally unreasonable.

I will charge that the Supreme Court has held that the use of deadly force, generally, against a felon who is fleeing from a crime is—I think the *Garner* decision states that it is unreasonable under the law—then I will go on to state what (5)(1668) the law is in the *Garner* decision, which governs this case, as does Penal Law 3530—that if a suspect or any person who commits any offense threatened the officer with the weapon or deadly weapon or any—or otherwise with imminent physical force, serious physical force, that the use of deadly force is justified—or that if the use of deadly force is justified, if the police officer reasonably believes that a felon has committed a crime involving the infliction or threatened infliction of serious physical harm, and that the officer reasonably believes that such level of deadly force is necessary to prevent an escape from custody, and where feasible, a warning is given—that, generally, is what I would be charging and would be charging also because that's expressed in 3530—I think the same thing is expressed in 3530.

3530 does give instances where—it gives three instances where that can be used, where a person has committed an offense.

Those three instances are if the offense is a felony or an attempt to commit a felony involving the use or attempted use or threatened imminent use of physical force against a person; (6)(1669) or the felony—excuse me—or the felon, in the course of resisting arrest or attempting to escape from custody, is armed with a fire arm or a deadly weapon; or regardless of any offense, the use of deadly force is necessary to defend the police officer or another person from what the police officer reasonably believes to be the use or imminent use of deadly physical force.

The section says that; that's what the section says.

MR. KUZMACK: Are we reading from 3530?

THE COURT: That's what the section says.

MR. KUZMACK: 3530, your Honor?

THE COURT: I'm reading subdivision C.

MR. KUZMACK: (Referring.)

THE COURT: That's not what *Garner* says. *Garner* says serious physical harm. I think I will state that it can be deadly physical force or serious physical harm.

MR. KUZMACK: Your Honor, I would submit that if we're going to be charging A-1, that you really don't need to charge C, because there is no—C really refers to any offense, which could include a traffic violation, misdemeanor or a felony;

* * *

(11) *Proceedings*

(Discussion off the record.)

THE COURT: On the record now.

With respect to six—

MR. BREITBART: Six is also in toto, Judge. I don't know—

THE COURT: I want to deal with one thing at a time.

There, in the first sentence, you indicate that if they should find that Rodriguez shot the plaintiff and Wise, as both of them lunged at him, thereby putting him in imminent fear of death—or serious physical injury—then you must find in favor of the defendant.

I am asking you now whether or not there would be an issue of fact as to whether or not the lunging, where he reasonably believed that by their lunging at him, he was put in imminent fear of death or serious physical injury—is that an issue of fact?

MR. BREITBART: Absolutely. He didn't testify to that.

MR. KUZMACK: Your Honor, I believe what the jury has to decide is whether it was reasonable for the officer to be in fear at that point as well (12) as—

THE COURT: That's what I'm saying, what he reasonably believed—that by the lunging, that he was in imminent fear of death or imminent physical injury, as defined.

If they so find, then they would find in favor of the defendant.

However, if they should find that the lunging did not—that he unreasonably believed—unreasonably believed—that the lunging placed him in imminent fear of death or serious physical injury, then they would then have to consider that—what would they consider, then?

MR. KUZMACK: Your Honor, I would submit that if they believed that these two guys lunged at him, that that, in and of itself, is enough for them to assume that it was reasonable for him to believe he was in physical—serious physical danger.

THE COURT: I disagree with you.

I think that it is still an issue of fact as to the jury.

But I'm saying, let us assume they find that the police officer unreasonably believed that he was placed in imminent fear of death or serious (13)(1676) physical injury, by the lunging, then, in that event—

MR. SIERADZKI: Then the use of deadly physical force was unjustified, no justification for the use.

THE COURT: For that—

MR. SIERADZKI: Under the scenario.

THE COURT: Yeah.

MR. KUZMACK: Obviously, I object to that.

MR. SIERADZKI: That was your position—I mean, all along, you were saying, using the lunging as justification for use of deadly physical force, because it put the police officer in imminent fear of harm.

That's consistent with what you've argued.

I don't understand why you're objecting now that the Judge puts that into his charge.

MR. SAWAYA: I don't think that the lunging can have any other reasonable—I don't think that anyone could find that if they lunged at him, he could have any other feeling under those circumstances except fear of physical harm.

THE COURT: I cannot tell you how the jury will feel. It's an issue of fact.

(14)(1677) MR. SAWAYA: A jury is still limited by—you still have to have a rational finding.

I don't think it would be rational to find that they lunged at him without putting him in fear.

MR. BREITBART: But you put evidence in that he became afraid.

MR. KUZMACK: He stated that he did.

MR. BREITBART: They were afraid that they were going to grab his gun or something.

THE COURT: At any rate, there was evidence—if they find again that he was unreasonable in his belief that he was

placed in imminent fear of death or serious physical injury by the lunging, then, in that event, the shooting was unjustified for that reason.

They would have to then go on to determine whether—well—to determine whether or not they believed the plaintiff's story, that he was shot in bottom of the stairwell and as to whether or not he reasonably believed that there was a forcible felony having been committed, and that in order to prevent escape and to effectuate an arrest, to determine whether the police officer reasonably believed that he was in deadly fear, that shooting (15)(1678) him in the stairwell was necessary.

MR. KUZMACK: Respectfully except to that, your Honor.

THE COURT: The balance of six is if, on the other hand, if you find that the officer fired his weapon while he was fleeing, after having committed a robbery, one of the bullets struck him in the spine, at the bottom of the steps, unarmed posed no significant threat—the police officers or a third person—you must find in favor of the plaintiff.

I deny to charge as requested.

I do not believe that that is the law. I believe, as I stated off the record, and I believe in part on the record, that if they should believe that plaintiff was shot in the back, at the bottom of the steps, and they disbelieve Police Officer Rodriguez's testimony of how and where the shooting occurred, then, in that event, it is for them to determine whether Police Officer Rodriguez acted with a reasonable belief that a forcible felony had been committed or attempted to have been committed and whether he reasonably believed that it was necessary to use the level of deadly force by shooting (16)(1679) the plaintiff in the back, at the bottom of the stairway, and to have given a warning before shooting, if feasible.

MR. BREITBART: And at this juncture, you'll read the guidelines?

THE COURT: I would be reading the guidelines probably before. I will be reading the guidelines, and I'll be reading 3530 as well as *Garner* before then.

MR. BREITBART: When you say you find for the plaintiff, find for the defendant—

THE COURT: I will do it—I will not do that up front; I will first read what the law is.

MR. BREITBART: I don't understand the scenario, then whereby on 6-B you're going to indicate that they must find in favor of the plaintiff.

THE COURT: I'm not saying that. I'm denying that request.

MR. BREITBART: I understand that. But you have just now rephrased it.

THE COURT: Yes?

MR. BREITBART: I just don't understand how the defendant can make no contentions, plead this case on the basis of lunging, and then be the beneficiary (17)(1680) of the Court's charge that if you don't believe our witness and you believe that the guy lied and you believe that there was a cover up, you still find for the defendant, because of some other reason.

THE COURT: Because of the law, because under the law—

MR. BREITBART: If it's only an issue of law, then the Court should have decided that, Judge. That's not the basis here. They must comply in the conjunctive with *Garner*, with 3530 and with the guidelines.

THE COURT: I agree with you.

MR. BREITBART: If they don't comply in the conjunctive with all of those three elements, then they must find for the plaintiff.

THE COURT: I will charge them as to *Garner* and P.L. 3530.

MR. BREITBART: And then the guideline?

THE COURT: As well as *Garner*—and I've read it already, on the record. I don't want to repeat it—except, I will state that one of the justifications for the use of deadly force under 3530—I have to repeat it—is if the offense is (18)(1681) a felony or an attempt to commit a felony involving the use or attempted use or threatened imminent use of physical force against a person, deadly force is justified.

I have added the scenario that assuming they disbelieve Rodriguez and they believe the plaintiff, that he ended up at the bottom of the stairs and was shot in the back, that in that event, that the officer also has to have a reasonable belief that such level of force was necessary.

MR. BREITBART: Right.

THE COURT: It goes back—you may disagree with me on that, but that's the way I'm going to charge it.

MR. BREITBART: (Referring.)

THE COURT: (Referring.)

So that's what I'm saying.

I'll deny the charge as requested in the last sentence of request six.

With respect to seven, I will deny such a charge.

I deny charging as requested, because it related to some cover up, and then I have to charge them—a request that I charge a cover-up story, (19)(1682) designed to justify an improper shooting, and that they may infer that this was, therefore, a result of consciousness of guilt on the part of the defendant and infer that this was a shooting outside the standards of propriety.

I deny to so charge.

That does not mean that the plaintiff cannot argue, in summation, that based upon the evidence and the inferences

that he draws, if the jury should draw, is that there was some type of a cover up.

You can so argue that in summation.

But the underlying issue here of law is whether the deadly force used was justified or unjustified.

That turns on the reasonable belief of the officer on a certain set of circumstances that confronted him that day.

With respect to defendant's requests to charge, I will charge everything here, except 1:75.

I believe it is cumulative

You have an exception, Mr. Kuzmack, to that.

MR. KUZMACK: As to 1:75, your Honor, it's failure to produce a witness, specifically Nancy McCummings, the mother of the plaintiff, who lived (20)(1683) with him and treated him and is a registered nurse.

That's just for the record.

THE COURT: I believe that you would have a right, Mr. Kuzmack, to refer in your summation that they didn't call him because a film was shown, his mother, a nurse, and that she might have been in a better position to shed some light in a material way to evaluate what assistance he needed for home care or nursing care.

You can certainly comment on that in your summation, and certainly Mr. Breitbart can comment on it any way he wishes to, should you raise the subject.

MR. KUZMACK: As to 3:4, your Honor?

THE COURT: I might say that she was subject to subpoena by either side to have appeared.

You could have subpoenaed her and so could Mr. Breitbart have subpoenaed her.

Anyway, as to the balance—

MR. KUZMACK: Your Honor, just on that same 1:75—

THE COURT: It's run out.

MR. KUZMACK:—as to 1:75, I would submit that she be subject to subpoena if she were just his (21)(1684) mother treating him, but the fact that she's a registered nurse puts her in the category of expert witness to some degree.

I believe that changes the request. That's all I wanted to say.

THE COURT: Well, under those circumstances, she could decline to answer any questions that would be put to her under subpoena, if she so chose, unless she were paid by you as your expert, or she could decide to answer your questions. The option really would be hers.

With respect to your request as to 3:4, I will be charging in the manner that I have stated, because I will be referring consistantly to the use of deadly force and not just to a battery as such.

I think, with the use of deadly force, different legal implications arise from just using physical force and justification for physical force.

So in my charge, it may encompass the substance of 3:4, but it's going to be in the context of the use of deadly force and not just physical force, such as a battery.

MR. KUZMACK: Respectfully, your Honor, I (22)(1685) would submit that I took 3:4 directly from the Pattern Jury Instructions and amended it as they state it must be.

I would respectfully point out to the Court that I do use the term "deadly physical force"—

THE COURT: No, you don't.

MR. KUZMACK:—in the second paragraph of 3:4.

THE COURT: You do not use "deadly physical force."

For instance, "One who seeks to make a legal arrest of another person lawfully in his custody has the right to use as much force as he reasonably believes necessary in order to

either make the arrest or prevent such person's escape and can be held civilly liable for such a use of force only if the force used was excessive."

This deals with physical force, not necessarily deadly force, and the P.J.I. makes quite clear the charge has to be modified if it's deadly force.

In addition to that, proceeding with respect to your request in the second paragraph, or the third paragraph down: (23)(1686) "In taking into consideration all of the circumstances," that paragraph of your request you refer— "then defendant was not justified in using force at all, and your verdict would be for the plaintiff"—and then you go on to say, "On the other hand, under certain circumstances, he was justified in using force to the extent that he reasonably believed it necessary to make the arrest to prevent the escape."

I believe that this is very confusing for the jury, because it does not refer to deadly force and it may just refer to just the use of physical force, but deadly force is an entirely different matter.

MR. KUZMACK: Respectfully, your Honor, the second paragraph, "Plaintiff claims that defendant, while plaintiff was attempting to escape, used excessive force in using deadly physical force, causing him to sustain two bullet wounds, one below the left shoulder," et cetera—

THE COURT: I will be stating that; that's one of the plaintiff's claims.

MR. KUZMACK: But your Honor, I would suggest that if the criticism of my request to charge is (24)(1687) that I don't specify deadly force, that can be replaced quite easily.

THE COURT: Well, I will be charging the use of deadly force. I will be charging it with respect to 3530, because it pinpoints it, right on the button.

I will be charging *Garner,* which pinpoints it right on the button—and also the guidelines.

MR. KUZMACK: As to the guidelines, may I address that?

THE COURT: Yes.

MR. KUZMACK: I would respectfully ask the Court to re-read *Caputo* and *Crosslind*—both of those cases are versus the Transit Authority—and—

THE COURT: Do I have them?

MR. KUZMACK: I've given them to your Honor, when I was arguing against the 1986 guidelines.

I don't have the copies with me today.

THE COURT: Which ones, *Crosslind* and *Caputo*?

MR. KUZMACK: Yes, your Honor.

THE COURT: (Referring.)

(Short pause.)

MR. KUZMACK: They both stand for the propo-

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(31)(1694) *Proceedings*

THE COURT: What interrogatories are your requesting?

MR. KUZMACK: I would request a question as to whether they found that the officer was lunged at and fired as a result of that.

THE COURT: What else?

MR. KUZMACK: Whether they found that the plaintiff was at the bottom of stairway PL-6; and that the officer fired from the landing, as he attempted to escape.

THE COURT: And what? Attempted to escape?

MR. KUZMACK: And that he fired as he attempted to escape.

THE COURT: All right.

MR. SIERADZKI: Those are the two factual issues.

THE COURT: You gave me three: lunged at, that the plaintiff was found at the bottom of the stairway—

MR. BREITBART: Those are not predicates for the determination of justifiableness or not; that's just what we were trying to avoid, to pigeon-hole the jury—your question, Judge, asked them the question whether it was—whether that was (32)(1695) necessary—

THE COURT: It's like asking whether it was negligence or not. You don't put to them questions like where was the car, where did it end up, where was the driver, where was he preceeding—

MR. KUZMACK: Respectfully, your Honor, for purposes of appeal, if we know that the jury disbelieved the officer and believed the plaintiff's story in its entirety, then the focus of appeal will be whether, because the officer had reason to believe that a forcible felony was being committed, whether he was justified in shooting or not.

THE COURT: Are you saying, then, that there should be another question posed: Did they believe that the police officer believed—what, a forcible robbery—you're giving me four now, instances.

MR. KUZMACK: Yes.

THE COURT: Anymore? I can think of many, many more—but you may have given me these four.

MR. KUZMACK: I believe those four will probably suffice, your Honor.

THE COURT: I will deny that request and put it to the jury just as we do in any negligence case: Was the defendant negligent in the operation or (33)(1696) control over the motor vehicle?

We don't go into the details. I don't think it's warranted here.

I will be covering it in the charge, after stating what your claims are; I will cover defendant's contention in the alternative, in the event that they believe the plaintiff and disbelieve—it's your contention that you're still justified—I will state that that's your contention.

I will deal with it in the law, and also as to how they may find with respect to these alternatives, either way or the other. I will deal with that.

But it will be covered in the charge. So I will just charge that one question: Did Police Officer Manuel Rodriguez use deadly force unjustifiably on June 28, 1984 against the plaintiff, Bernard McCummings?—and then proceed into the damages.

MR. BREITBART: Is my recollection correct, Judge, that you reserved decision on the motion to reinstate the second cause of action?

THE COURT: Right.

MR. KUZMACK: I'm sorry?

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APPENDIX Y—Evidence of Warning.

(149) Q. Just that you observed two male blacks mugging an old man?

OFFICER MEAD: Yes.

Q. What happened next?

A. At that point Officer Rodriguez said "Police! don't move!" And with that he started shooting. He pushed me back. I couldn't see anything at that point, what he was shooting at.

* * *

(323) MR. SANDUSKY: I saw this fellow come kind of running down the stairway, and as I recall he said, "Drop him and freeze."

THE COURT: He said what?

THE WITNESS: "Drop him and freeze." Because he apparently saw that they were choking me and I guess the reason he came down is because he must have heard me.

* * *

(27)(1517) OFFICER RODRIGUEZ: Now, as I was walking toward the exit gate to enter the subway, I heard screams of "help, help," and like a man was being choked.

I ran immediately down the stairs. I had my revolver in my hand, my right hand, with the newspaper covered over it. I had my finger out of the trigger so, accidentally, I could not shoot it. And I went downstairs, down the stairs to see what was happening.

As I approached down on the landing between the two stairs, when I got there, I observed that the two males, two male blacks that we had observed earlier was there along

with the third one up on top of the stairway. They had an old man on the ground. One of them was choking him around the neck and he appeared to be almost dying. The man was red in the face and he was screaming for help.

Now, it was Mr. Wise who was on the right hand that was choking him. The man was on the ground. And Mr. McCummings was on his left going through the man's pockets, taking out his belongings and throwing them on the floor. (28)(1518) There was all kinds of stuff on the floor, change and keys. Mr. Sandusky's glasses were on the floor at the time.

Now, when I reached the landing there, I had my gun. I took the paper and I threw it over the gun. I pointed the gun toward the right-hand side and I said, "Police, Don't move" to the two culprits.

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